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ABSTRACT

The standard for copyright infringement is the same across different forms of expression. But musical expression poses special challenges for courts deciding infringement disputes because of its unique attributes. Tonality in Western music offers finite compositional choices that will be pleasing or satisfying to the ear. The vast storehouse of existing public domain music means that many of those choices have been exhausted. Although independent creation negates plagiarism, the inevitable similarity among musical pieces within the same genre leaves courts in a quandary as to whether defendant composers infringed earlier copyrighted works or simply found their own way to a similar melody, harmony, rhythm, or formal structure. This Article explores the knotty legal issues embedded in copyright infringement cases involving musical expression and suggests a methodology for cutting through the knots. By delving into the historical development of Western music and tonality, it attempts to connect music history and theory with copyright jurisprudence's ultimate goal of balancing private protection of expressive works with public access to them.

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** Professor Emeritus of Music History, Music Theory, and Bassoon, Roosevelt University. D.M.A., Boston University. This Article is dedicated to the memory of my parents, Mary and Antonio Urbinato, who inspired me to devote my life to music.

TABLE OF CONTENTS

Imagine two different people wearing the same or similar perfume. Each person obviously retains his or her unique identity, at least beyond the olfactory connection. A musical work similarly retains its identity, even if one or more sections sound like—that is, resemble or are structured somewhat like—another composition. Two individuals wearing *Chanel No. 5* may indeed smell alike but are clearly distinctive human beings. Two popular songs likewise may sound alike to the average person, but beneath this superficial resemblance are quite different compositions. This Article explores the troublesome aspects of copyright infringement doctrine as applied to music in light of the policy goals of fostering creation, protecting legitimate property rights, and avoiding undue monopolies of our shared cultural heritage.

Copyright law protects a creator's original work of authorship from plagiarism.[1] As Western culture began to recognize creation as the expression of the individual ego as opposed to a means of serving the common good, the law evolved to provide protection for creative works from encroachment by others.[2] If one creates for the community alone, then the expressive product theoretically belongs to the community as a whole and can be borrowed and built upon by all members of the community.[3] If, on the other hand, individuals produce creative works to express a part of themselves, to contribute their unique vision to the world, or simply to make a living for themselves and their families, then they naturally seek to prevent others from using their work without permission.[4] Copyright law developed in England in the eighteenth century as the notion of the autonomous creator began to take hold.[5]

The first US copyright law was patterned on its English forebears and initially protected only books, charts, and maps.[6] Several decades later, Congress amended the law to include musical works.[7] In the early to mid-nineteenth century, Europe was the center of unparalleled Western musical achievements, as Beethoven, Schubert, Mendelssohn, Schumann, Chopin, and Berlioz, among others, produced numerous masterworks.[8] European works dominated the US musical scene.[9] US classical and popular music,

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1. *See, e.g.*, Copyright Act of 1976, 17 U.S.C. §§ 106, 501 (2006) (defining exclusive rights of copyright holder and providing a cause of action for infringement). Throughout this Article, the Authors refer to both plagiarism and infringement. Plagiarism refers generally to the unconsented appropriation of another's work, usually without attribution. Copyright infringement is a subset of plagiarism and entails the unconsented appropriation of another's copyrighted work, with or without attribution. Thus, one can plagiarize a public domain work without legal liability—only societal disapproval. Plagiarism of a protected work, however, will expose the plagiarizer to a potential lawsuit by the rights holder.

2. *See* BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 22-24 (1967) (describing the emergence of a class of professional writers who sought legal "protection and recognition").

3. During the Renaissance, for example, authors were regarded either as craftsmen who sought to manipulate received literary traditions so as to please the "cultivated audience of the court" or individuals "inspired" by a muse or divine forces. *See* Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'*, 17 EIGHTEENTH-CENTURY STUD. 425, 426-27 (1984).

4. *See id.* at 426, 433.

5. *See* Statute of Anne, 1710, 8 Ann., c. 19 (Eng.); Woodmansee, *supra* note 3, at 426-27.

6. Copyright Act of 1790, ch. 15, § 5, 1 Stat. 124 (current version at 17 U.S.C. § 102 (2006) (describing categories of copyrightable material)).

7. Copyright Act of 1831, ch. 15, § 4, 4 Stat. 436 (current version at 17 U.S.C. § 102 (2006) (describing categories of copyrightable material)).

8. *See* BARRYMORE LAURENCE SCHERER, A HISTORY OF AMERICAN CLASSICAL MUSIC 25 (2007).

9. *Id.*

however, began to develop, and by the end of the nineteenth century, domestic composers had generated a respectable body of work, though largely derivative of European models,[10] and began to invoke copyright law to protect their compositions.[11] The use of copyright to enforce rights in music has increased throughout the twentieth century and into the new millennium.[12]

This Article examines the unique properties of music that distinguish it from other expressive works, such as literary compositions and works of visual art. It discusses how those unique qualities have influenced the development of copyright for musical compositions and how, in some cases, the courts have missed the mark in trying to mold a copyright jurisprudence grounded in protection of literary works around the musical sphere. Quite simply, music is the only type of creative work that humans experience primarily through the ear.[13] Humans largely absorb and recollect other expressive works visually.[14] Although this distinction may appear at first to be without much legal significance, it should and does have considerable impact on copyright doctrines such as access, independent creation, infringement, and the use of experts in the litigation process.

This Article recognizes that music is a singular form of creative expression and suggests that courts employ a different standard for copyright infringement of musical works. Part I of this Article contains a brief history of musical patronage in Western culture, as

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10. *See* RICHARD CRAWFORD, AMERICA'S MUSICAL LIFE 372-82 (2001) (describing the career of US-born, European-trained Edward MacDowell (1860–1908), one of the first notable US composers). "MacDowell's career and music show America's dependence on Europe" in the late nineteenth century. *Id.* at 381; *see also* NICHOLAS E. TAWA, MAINSTREAM MUSIC OF EARLY TWENTIETH CENTURY AMERICA: THE COMPOSERS, THEIR TIMES, AND THEIR WORKS 103 (1992) (describing the emergence of "music nationalism" within the United States at the beginning of the twentieth century).

11. *See* J. Michael Keyes, *Musical Musings: The Case for Rethinking Music Copyright Protection*, 10 MICH. TELECOMM. & TECH. L. REV. 407, 412-14 (2004) (recounting the growth of the US music industry and the creation and enforcement of the public performance right for music copyright holders in the late nineteenth century).

12. UCLA and Columbia Law Schools sponsor a website containing notable copyright infringement cases from the mid-nineteenth century to the present, along with samples of the musical works involved, where available. This collection of cases reveals a marked increase in copyright litigation over time. *See Music Copyright Infringement Resource*, UCLA SCH. OF L., http://cip.law.ucla.edu/cases/Pages/default.aspx (last visited Feb. 23, 2012).

13. For a discussion of the auditory and neurological mechanisms by which humans discern and analyze sound, particularly music, see ROBERT JOURDAIN, MUSIC, THE BRAIN, AND ECSTASY: HOW MUSIC CAPTURES OUR IMAGINATION 1-29 (1997).

14. *See* Andy Hamilton, *Music and the Aural Arts*, 47 BRIT. J. AESTHETICS 46, 46 (2007) ("The visual arts include painting, sculpture, photography, video, and film. But many people would argue that music is the universal or only art of sound."). Like dramatic works, music has both visual and aural components. Musicians "read" music, but its expressive impact comes when it is heard.

well as an overview of the development of tonality in Western music. Part II examines the general approach to copyright infringement that courts use in music cases. Part III of this Article discusses copyright issues that affect music plagiarism cases in a distinctive way, including questions of access, independent creation, subconscious copying, and the use of expert testimony to assist the trier of fact. Part IV presents a case study drawn from a recent federal district court decision that illustrates the difficulties besetting judges—generally musical lay persons—in parsing two musical compositions, one of which allegedly infringes the other. Part V explores music infringement in an historical and musicological context and offers observations about the challenges of forcing music into the legal mold for copyright infringement developed primarily for literary works. Finally, Part V suggests modifications to the current model for proving infringement in cases involving musical works.

I. BACKGROUND ON THE DEVELOPMENT OF WESTERN MUSIC AND TONALITY

Two widely accepted jurisprudential theories that justify copyright laws are utilitarianism and natural law.[15] Under utilitarian theory, copyright laws should provide the optimal level of incentives for creators to produce expressive works.[16] According to this view, the works thus created should eventually pass into the public domain for the benefit of society as a whole.[17] Under natural law theory, creators have a moral right or entitlement to the fruits of their labors.[18] The

15. PETER DRAHOS, A PHILOSOPHY OF INTELLECTUAL PROPERTY 32-33 (1996).

16. *See* Eldred v. Ashcroft, 537 U.S. 186, 212 n.18 (2003) (referring to the economic underpinnings of US copyright jurisprudence and stating that "copyright law serves public ends by providing individuals with an incentive to pursue private ones"); Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 993-98 (1997) (discussing the economic foundations of copyright law).

17. *See* Golan v. Holder, 132 S. Ct. 873, 900-02 (2012) (Breyer, J., dissenting) (emphasizing the importance of copyright as a mechanism for promoting increased production of expressive works for the ultimate benefit of the public and underscoring the sanctity of the public domain); Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant . . . copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors.").

18. The works of philosophers John Locke and Georg Wilhelm Friedrich Hegel are often cited as support for the natural law theory of copyright. Locke argued that man, through the expenditure of effort, earned the right to the product of that effort. *See* JOHN LOCKE, TWO TREATISES ON GOVERNMENT 306 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690). Hegel asserted that property was in some sense an extension of an individual's personality and thereby indisputably his own. *See* GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT 45 (T.M. Knox trans., Oxford Univ. Press 1953) (1820). For contemporary explications of this view, see

intellectual goods that they create are justifiably regarded as a type of property subject to traditional property rights such as exclusion, alienation, and use.[19] Beyond utilitarianism and natural law, commentators have offered other, less-heralded theories to justify copyright.[20]

Whatever the theoretical justification for copyright legislation, it is necessary to address the impact of that justification on the standard for infringement in copyright cases. An infringement standard that is too broad—that is, finds liability frequently—will potentially result in the underproduction of creative works and the failure to reward those who have created something genuinely original. Paradoxically, an infringement standard that is too narrow—that is, finds liability rarely—will have a similar effect. Creators will be reluctant to publish new works for fear that others can steal them and thus diminish the creators' economic rewards without any negative consequences. Thus, it is essential to craft, as best one can, an infringement standard that properly rewards creators and deters infringers. This Article explores the special difficulties associated with original musical compositions—difficulties that hinder the development of the proper legal standard for infringement.

To fully understand the present doctrine concerning copyright infringement in music cases, it is necessary to examine, at least briefly, the historical framework in which music compositions were created, underwritten, and subsequently borrowed. In addition, an overview of Western tonality and practice illuminates the restrictions that many contemporary composers face in creating new musical compositions that are distinct from preexisting works but remain true to their genre.[21]

Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988); Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517 (1990).

19. *See generally* Hughes, *supra* note 18, at 293-97; Lior Zemer, *The Making of a New Copyright Lockean*, 29 HARV. J.L. & PUB. POL'Y 891 (2006) (discussing the Lockean theory of copyright).

20. *See* Carys J. Craig, *Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law*, 15 AM. U. J. GENDER SOC. POL'Y & L. 207 (2007); James Grimmelmann, *The Ethical Visions of Copyright Law*, 77 FORDHAM L. REV. 2005 (2009); Christian G. Stallberg, *Towards a New Paradigm in Justifying Copyright: An* [sic] *Universalistic-Transcendental Approach*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 333 (2008).

21. The citation of selected musical compositions as documentation is the Author's (Dr. Urbinato's) view of what constitutes aesthetic, stylistic, musical points of reference. Such points of view are based on and supported by his experience as a university professor of music history and theory and are supplemented by a dual career as a professional bassoonist and pianist exposed to a vast repertoire of Western music: classical, pop, and folk. Aesthetic opinions are

A. A Brief History of Western Musical Patronage: Early Incentives for Musical Creation

Before copyright laws, creators were incentivized to produce expressive works without legal protection. The idea that creators had enforceable rights in their works developed only in the post-Classical era and was not fully embraced in the musical context until the Romantic era of the nineteenth century.[22] Before that point, authors were prompted to create such works through the expectations and support of societal institutions, the nobility, or wealthy individuals.[23]

The earliest recorded patron of Western musical composers was the Roman Catholic Church.[24] From the Middle Ages onward, the Church encouraged or required musical composition by the clergy as an appropriate means of intoning the Mass,[25] extolling the Holy Trinity of God the Father, God the Son, and God the Holy Ghost, and spiritually fortifying worshippers.[26] Priests and monks rarely received individual recognition or separate monetary compensation for composing the unaccompanied recitational, liturgical, monophonic singing known as chant,[27] identified by the sixth century as Gregorian chant.[28] The concept of copyright as a means of providing legal protection for expressive works did not exist, as many churches freely circulated and shared these chants.[29]

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inevitably subjective and cannot be proven in a traditional, analytic sense. Even a thorough musical/theoretical/formal analysis, technically understood by only highly trained musicians, cannot prove such an aesthetic or stylistic conclusion. An aural documentation must be experienced directly. A detailed theoretical analysis of cited compositions would be beyond the scope of this work and its intended readers.

22. REINHARD G. PAULY, MUSIC IN THE CLASSIC PERIOD 205-06 (1965).

23. *See infra* notes 24-75 and accompanying text.

24. *See* Michael Hurd, *Patronage*, THE OXFORD COMPANION TO MUSIC, *available at* http://www.oxfordmusiconline.com ("In medieval times . . . the chief patron was the church.").

25. *See* ALBERT SEAY, MUSIC IN THE MEDIEVAL WORLD 15 (2d ed. 1975) ("Not only was it considered as the appropriate medium for addressing God, but it was also understood as a tool by which God and his works could be comprehended and interpreted.").

26. *See* J. PETER BURKHOLDER ET AL., A HISTORY OF WESTERN MUSIC 24-25, 51 (7th ed. 2006) ("The role of the music was to carry those words, accompany those rituals, and inspire the faithful.").

27. *See* GEOFFREY WAINWRIGHT & KAREN B. WESTERFIELD TUCKER, THE OXFORD HISTORY OF CHRISTIAN WORSHIP 244-45 (2005); Kenneth Levy et al., *Plainchant*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com.

28. *See* BURKHOLDER ET AL., *supra* note 26, at 31-32. Gregorian chant was also known as "plainchant" or "plainsong." *See* James W. McKinnon, *Gregorian Chant*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com.

29. Susan Boynton, *Plainsong*, *in* THE CAMBRIDGE COMPANION TO MEDIEVAL MUSIC 18-20 (Mark Everist ed., 2011) (describing evolution of liturgy and chant across Europe).

As early as the late Middle Ages and early Renaissance (c. 1300s), the burgeoning of a secular society interested in cultivating the musical arts resulted in court patronage of musicians, composers, and singers.[30] Largely separate from the liturgical context, music texts derived from medieval and Renaissance poetry, including that of the Troubadours and the Trouvères.[31] In sixteenth-century Germany, guilds were organized to teach singing and musical composition, and the completion of this musical training resulted in one's becoming a Mastersinger.[32] Musical language expanded beyond chant to the natural rhythms and accents of texts based on courtly love, heroism, chivalry, the virtues (or nonvirtues) of womanhood, and imitations of nature.[33] Although royal patronage increased during this period, many composers such as Josquin, Palestrina, and DeLassus continued writing masses and other liturgical works while receiving support from the Church.[34] In the late Italian Renaissance, the courts of the Medici family[35] in Florence and of the Gonzaga family[36] in Mantua[37] played an especially significant part in fostering secular composition, as did those of the French kings and of the English king, Henry VIII.[38]

By the Baroque era (c. 1600–1750),[39] private patronage played a substantial part in many composers' careers, as did newly formed,

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30. *See* BURKHOLDER ET AL., *supra* note 26, at 71 ("Medieval music was shaped by currents in the wider society: political developments, the emergence of nations and linguistic regions, economic growth, social class, and support for learning and the arts."). As regional nobility gained power, local "princes, dukes, bishops, and administrators . . . competed for prestige by hiring the best singers, instrumentalists, and composers, which fueled the development of music until the nineteenth century." *Id.* at 73.

31. *See id.* at 73-78. "The most significant body of vernacular song in the Middle Ages was the lyric tradition cultivated in courts and cities under aristocratic sponsorship. The tradition began in the twelfth century with the *troubadours* . . . poet-composers in southern France . . . and spread north to the *trouvères* . . . ." *Id.* at 76; *see also* John Stevens et al., *Troubadours, Trouvères*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com.

32. *See* BURKHOLDER ET AL., *supra* note 26, at 258 ("The Meistersinger were urban merchants and artisans who pursued music as an avocation and formed guilds for composing songs according to strict rules and singing them in public concerts and competitions."). For a fictional depiction of this tradition, see Barry Millington, *Meistersinger von Nürnberg, Die*, THE NEW GROVE DICTIONARY OF OPERA, *available at* http://www.oxfordmusiconline.com.

33. *See* BURKHOLDER ET AL., *supra* note 26, at 71-76.

34. *See id.* at 203-09, 228-35.

35. *See* Frank A. D'Accone, *Medici*, GROVE MUSIC ONLINE, *available at* http://www.oxford musiconline.com.

36. *See* Claudio Gallico, *Gonzaga*, GROVE MUSIC ONLINE, *available at* http://www.oxford musiconline.com.

37. *See* Claudio Gallico, *Mantua*, GROVE MUSIC ONLINE, *available at* http://www.oxford musiconline.com.

38. *See* BURKHOLDER ET AL., *supra* note 26, at 155-57, 258-59.

39. *See* Stanley Sadie, *The Baroque Era*, THE OXFORD COMPANION TO MUSIC, *available at* http://www.oxfordmusiconline.com.

privately organized concert societies, opera companies, and other choral organizations.[40] But the greater patronage system of court and church continued in full bloom.[41] Major composers such as Bach, Handel, and D. Scarlatti were among the many beneficiaries of this system.[42] Wealthy patrons commissioned composers for various works and often dictated the type of composition to be created.[43] The court of Louis XIV famously employed a company of singers, dancers, a Baroque orchestra, and smaller chamber ensembles, which fostered the careers of Lully and Rameau, resulting in the composition of opera, ballet, and chamber and orchestral music.[44] The popularity of instrumental music in Venice, from the late Renaissance on, gave rise to the greatly expanded development of solo and chamber works for strings, winds, and brass, all of which largely contributed to the concept of the Baroque and the later Classical, Romantic, and Modern symphony orchestra.[45]

From the early Classical Period (c. 1720s–1780) to its apex (c. 1780s–1805),[46] the patronage system continued to be centered in the royal courts and in the Church.[47] But it included further patronage by professional music societies, which sponsored public concerts.[48] The increasing popularity of opera fostered the growth of professional companies that depended on public support.[49]

The social and political revolutions of the late eighteenth century brought about the decline of the aristocracy and, with it,

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40. *See* BURKHOLDER ET AL., *supra* note 26, at 291-92.

41. *See id.*

42. Handel flourished as a composer of opera and oratorio as well as instrumental music and relied on audience (i.e., public) support. PAUL GRIFFITHS, A CONCISE HISTORY OF WESTERN MUSIC 118-19 (2006). As a composer of primarily instrumental (secular) music, Bach was employed by the City of Anhalt-Cöthen. *Johann Sebastian Bach*, THE OXFORD DICTIONARY OF MUSIC, *available at* http://www.oxfordmusiconline.com. Scarlatti concentrated on solo harpsichord sonatas while employed in Spain. Roberto Pagano et al., *Domenico Scarlatti*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com.

43. *See* BURKHOLDER ET AL., *supra* note 26, at 292, 297.

44. *See id.* at 355-66, 434.

45. *See id.* at 264-65, 281-82.

46. *See id.* at 477-78; Stanley Sadie, *The Classical Era*, THE OXFORD COMPANION TO MUSIC, *available at* http://www.oxfordmusiconline.com.

47. *See* Sadie, *supra* note 46 ("In 1750, most composers were employed by private patrons or by the church . . . .").

48. *See* BURKHOLDER ET AL., *supra* note 26, at 471-77; *see also The Classical Period*, *in* 1 THE NEW OXFORD COMPANION TO MUSIC 412, 413 (Denis Arnold ed., 1983) ("[T]he rise of concert series, such as those in Paris, London, and Vienna, . . . attracted a broader audience than formerly.").

49. *See* BURKHOLDER ET AL., *supra* note 26, at 497; *The Classical Period*, *supra* note 48, at 413 ("The opera house was subsidized by the aristocracy but relied heavily on public support . . . .").

composers' and musicians' full-time employment in the royal courts.[50] Composers became increasingly dependent on private music societies, concert organizations, and opera companies for patronage.[51] The Church also continued to support and commission composers for new liturgical compositions and to sustain traditional musical liturgical practice.[52]

In the nineteenth century, private and royal patronage of music existed side by side. Beethoven was the first major composer who was never employed full-time by the courts.[53] Rather, he depended primarily on the private patronage of admiring aristocrats as well as on private tutelage and the performance and sale of his published compositions.[54] Although in decline, the private patronage system continued to benefit such early nineteenth-century composers as Schubert, Chopin, Berlioz, and Schumann to varying degrees.[55] But composers also earned income through private tutelage and in other ways.[56] Schubert taught school for a few years; Schumann became a professional music critic, author, and beneficiary of commissions from concert societies.[57] Berlioz was a prolific author and music critic, as well as a renowned conductor of the newly emerging Romantic Symphony.[58] Chopin taught a number of gifted piano students and received generous support in his later years from the novelist George Sand.[59] The wealthy Mendelssohn, on the other hand, neither needed nor depended on such patronage.[60] With the rise of

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50. Sadie, *supra* note 46 ("[B]y 1800, private patronage was greatly diminished and increasing numbers of composers now had to make their living on a freelance basis, composing and performing for a wider public.").

51. *See* BURKHOLDER ET AL., *supra* note 26, at 507, 526.

52. *See id.* at 525.

53. *See id.* at 576-79; *see also* Joseph Kerman et al., *Ludwig van Beethoven*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com.

54. *See* BURKHOLDER ET AL., *supra* note 26, at 573, 576-79.

55. *See* Hugh Macdonald, *Hector Berlioz*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com; Kornel Michałowski & Jim Samson, *Fryderyk Franciszek Chopin*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com; Robert Winter et al., *Franz Schubert*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com.

56. *See, e.g.*, BURKHOLDER ET AL., *supra* note 26, at 624.

57. *Id.* at 606, 612. Schubert's career, in particular, suffered from the lack of wealthy patronage "offered earlier in the century when Beethoven flourished in palatial residences." Sigrid Wiesmann, *Vienna: Bastion of Conservatism*, *in* MUSIC SOCIETY AND THE EARLY ROMANTIC ERA BETWEEN REVOLUTIONS: 1789 AND 1848, at 84, 95 (Alexander L. Ringer ed., 1990); *see also* John Daverio & Eric Sams, *Robert Schumann*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com.

58. *See* Macdonald, *supra* note 55.

59. *See* Michałowski & Samson, *supra* note 55.

60. *See* R. Larry Todd, *Felix Mendelssohn*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com.

public piano recitals (beginning in Paris), concert societies throughout Europe handsomely paid performers like Liszt.[61] At the same time, royal patronage continued to some degree: Liszt held an appointment at the court of Weimar, where from 1848–1861 he strove to develop the city as a major cultural center.[62] Further, King Ludwig II of Bavaria famously patronized Wagner; this support resulted in the building of the Bayreuth opera house, the ultimate venue for Wagner that persists to this day.[63]

Throughout the late nineteenth century, composers in the major capitals of Western Europe typically depended on institutional support (that is, employment) from music conservatories and professional music organizations as well as individual support from private beneficiaries.[64] For fourteen years, an adoring fan, Nadezhda von Meck, patronized Tchaikovsky.[65] The newly founded Moscow and St. Petersburg Conservatories provided employment for a bourgeois group of newly professional composers, including Rimski-Korsakov and Rubinstein.[66] In late nineteenth- and early twentieth-century France, the Schola Cantorum[67] and the Paris Conservatory became the major benefactors of such luminaries as Fauré, Massenet, and Saint-Saëns.[68] Concert societies and private patrons also fostered the careers of Debussy, Ravel, and others.[69]

In the early twentieth century, Stravinsky, exiled from Russia, lived and worked in Switzerland and eventually Paris, where he produced many major works, including the revolutionary *The Rite of*

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61. *See* Alan Walker et al., *Franz Liszt*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com.

62. *Id.*

63. The Festival at Bayreuth introduced Wagner's *Ring Cycle* as well as *Parsifal*. *See* Geoffrey Skelton, *Bayreuth*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com.

64. *Music and Society*, *in* 3 EUROPE 1789 TO 1914: ENCYCLOPEDIA OF THE AGE OF INDUSTRY AND EMPIRE 1565-73 (John Merriman & Jay Winter eds., 2006).

65. *See* Roland John Wiley, *Pyotr Il'yich Tchaikovsky*, GROVE MUSIC ONLINE, http://www.oxfordmusiconline.com.

66. FRANCIS MAES, A HISTORY OF RUSSIAN MUSIC: FROM KAMARINSKAYA TO BABI YAR 36-37, 170 (Arnold J. Pomerans & Erica Pomerans trans., 2002).

67. *See Schola Cantorum*, THE OXFORD COMPANION TO MUSIC, *available at* http://www.oxfordmusiconline.com.

68. *See* Gordon A. Anderson et al., *Paris*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com.

69. François Lesure & Roy Howat, *Claude Debussy*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com ("Debussy made his first appearance on the larger stage of Parisian artistic society in 1893 . . . . [Debussy] became a close friend of Ernest Chausson, who gave him both financial and moral support.").

Spring (1913) for the resident Ballets Russes.[70] By then, resident composer-teachers became and have remained the norm of the academic patronage system.[71] From the late nineteenth century onward, the rise of public concerts throughout Europe and the United States spurred the formation of professional symphony orchestras, opera houses, and concert societies, which supported solo, chamber, and voice recitals.[72] With the advent of recording, the commercial market afforded further financial support.[73]

In presenting lighter fare, Broadway musical theatre and Hollywood film studios provided "patronage" for a number of composers, including Jerome Kern, George Gershwin, and, currently, Stephen Sondheim.[74] Today, nearly all of the aforementioned elements come into play as a loosely amalgamated "patronage" system, providing employment through universities and conservatories, theatre and opera, the recording industry, and concerts in commercial venues for touring.[75]

This brief overview of music patronage reveals that composers can be encouraged to write musical works even without the protections of copyright law. The desire for divine favor, a sense of religious obligation, the impulse to curry favor with the royal court, the allure of public admiration, and the profound need to express oneself can all fuel a composer's efforts to create. But in the modern day, many of these historic incentives have disappeared; the prospect of financial reward remains a primary motivator for artistic creation, particularly composition and performance of popular music.[76] Musicians cannot fully realize that reward, as this Article discusses, without legal protection against infringement.

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70. *See* Stephen Walsh, *Igor Stravinsky*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com.

71. *See* Hurd, *supra* note 24 ("Composers were sometimes obliged to undertake general musical work in order to supplement their precarious incomes—conducting, performing, teaching, music criticism, and so on.").

72. *See* HENRY RAYNOR, THE ORCHESTRA 174-79 (1978) (describing the growth of the orchestra system in Europe and the United States).

73. For an overview of the development of the US music industry, see MICHAEL FINK, INSIDE THE MUSIC INDUSTRY: CREATIVITY, PROCESS, AND BUSINESS 3-25 (2d ed. 1996).

74. *See* BURKHOLDER ET AL., *supra* note 26, at 902-04.

75. *See* Hurd, *supra* note 24 ("Patronage of a kind continues today in the form of commissions from performing organizations, individual artists, and festivals, often supported by commercial sponsorship.").

76. Of course, many individuals still find satisfaction, apart from monetary compensation, in creating music for online sharing, church worship, garage bands, and community theatre.

B. The Components of Composition: Music Theory as a Complex Aspect of Music Infringement Cases

Determining copyright infringement is a multilayered process that ends with an assessment of whether the defendant's work is, from the perspective of the ordinary lay observer, reader, or listener, substantially similar to the plaintiff's work. Courts often use expert testimony to determine whether, from a technical standpoint, the defendant is likely to have copied from the plaintiff.[77] In music cases, experts have assumed greater importance than in cases involving other types of creative works because the technical aspects of music composition and theory are often unfamiliar to a lay judge or jury.[78] The music expert can put a musicological framework around both works and give an opinion as to whether the patterns of notes and chords appearing in the defendant's work are likely to have been the product of independent creation, reliance on a common public domain source, or copying of the plaintiff's work.[79] Thus, in analyzing judicial opinions in music infringement cases, it is useful to have some understanding of the basics of Western music theory and composition.

1. Tonal Practice in Western Music: The Basics

An understanding of the musical achievements of the Common Practice Period,[80] as discussed above, reveals a fundamental correspondence between virtually all Western music and the precepts of what is known as tonality.[81] Various pitch organizations, whether melodic, harmonic, or contrapuntal, concepts of consonance and dissonance, and corresponding rhythms, beats, accents, and formal

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77. *See* Moore v. Columbia Pictures Indus., Inc., 972 F.2d 939, 945-46 (8th Cir. 1992) (describing use of experts in the extrinsic phase of the substantial similarity analysis).

78. As one Eighth Circuit justice explained:

> I have played the tape which contains the two musical compositions and although I do not know the difference between be-bop, hip-hop, and rock and roll, the tunes all sound the same to me. This may be because I have no ear for music other than reflecting my generation's preference for the more soothing rhythms of Glen Miller and Wayne King or the sophisticated beat of Woody Herman playing the Wood Chopper's Ball. Obviously judges have no expertise to resolve this kind of question . . . .

Id. at 948 (Lay, J., concurring in part, dissenting in part).

79. *See, e.g.*, Repp v. Webber, 132 F.3d 882, 886-87 (2d Cir. 1997) (describing extensive expert affidavits submitted by both parties); Straughter v. Raymond, No. CV 08-2170 CAS (CWx), 2011 U.S. Dist. LEXIS 93068 (C.D. Cal. Aug. 19, 2011).

80. *See* WALTER PISTON & MARK DEVOTO, *Introduction to the First Edition (1941)* of HARMONY xx (4th ed. 1978) ("[T]he period in which this common practice may be detected includes roughly the eighteenth and nineteenth centuries.").

81. *Id.*

structure, are all rooted in the organization of eight notes on or around one principal tone—hence, tonality.[82] Through centuries of practice, the most gifted and influential composers have permanently established what we now call common practice.[83] Whether listening to an esoteric work of Bach, a tone poem of Debussy, a Johann Strauss waltz, a Beatles tune, Frankie Valli's "Can't Take My Eyes Off of You," or Whitney Houston's "I Will Always Love You," the informed ear will recognize the melodic, tonal, rhythmic, and formal similarities among all these works.[84] Popular music distills the earlier and generally more complex, layered musical elements of classical music into a more speech-like style usually encapsulated in a simple two- or three-part form, organized into four eight-bar phrases.[85]

The establishment of Western tonality roughly coincides with Newton's discovery of gravity in the late seventeenth century.[86] Tonality may be defined as a musical theoretical concept centered on one primary pitch or tone (that is, gravity), which at least seven other pitches or chords gravitate away from and finally back to.[87] The seven subsidiary pitches are arranged in a fixed series of whole and half steps known as major, minor, or modal scalar patterns within an octave. These pitches respectively may be major: C, D, E, F, G, A, B, and C;[88] melodic minor: C, D, E flat, F, G, A (A flat), B (B flat), and C; or harmonic minor: C, D, E flat, F, G, A flat, B natural, and C.[89]

These scalar intervals may also be arranged in patterns of whole- and half-step intervals similar to, but different from, standard

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82. *See* Brian Hyer, *Tonality*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com.

83. *Id.*

84. *See* JOHANN SEBASTIAN BACH, *Mass in B Minor* (1749); CLAUDE DEBUSSY, *La Mer* (1905); JOHANN STRAUSS, *Tales From the Vienna Woods* (1868); THE BEATLES, *Yesterday*, *on* HELP! (Parlophone 1965); FRANKIE VALLI, *Can't Take My Eyes Off Of You*, *on* THE 4 SEASONS PRESENT FRANKIE VALLI SOLO (Philips 1967); DOLLY PARTON, *I Will Always Love You*, *on* JOLENE (RCA 1974); WHITNEY HOUSTON, *I Will Always Love You*, *on* THE BODYGUARD (Arista 1992).

85. *See* John Covach, *Form in Rock Music: A Primer*, *in* ENGAGING MUSIC: ESSAYS IN MUSIC ANALYSIS 69-74 (Deborah Stein ed., 2005).

86. *See* MANFRED F. BUKOFZER, MUSIC IN THE BAROQUE ERA: FROM MONTEVERDI TO BACH 219 (1947) ("Tonality was not 'invented' by a single composer or a single school. It emerged at approximately the same time in the Neapolitan opera and in the instrumental music of the Bologna school and was codified by Rameau more than a generation after its first appearance in music.").

87. *See* BURKHOLDER ET AL., *supra* note 26, at 305, 365; Hyer, *supra* note 82; *see also Tonality*, THE OXFORD DICTIONARY OF MUSIC, *available at* http://www.oxfordmusiconline.com.

88. *See* William Drabkin, *Major*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com.

89. *See* William Drabkin, *Scale*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com; *see also Scale*, THE OXFORD DICTIONARY OF MUSIC, *available at* http://www.oxfordmusiconline.com.

major and minor models. These are known as modes rather than keys.[90] Examples include the Dorian mode: D, E, F, G, A, B, C, and D,[91] and Phrygian mode: E, F, G, A, B, C, D, and E.[92] The various forms of major and minor modes gravitate toward their final central pitch. Modal forms may cadence on a related pitch other than their usual center of gravity (key pitch).[93] The succession of scalar pitches may be, in effect, infinitely varied to form two predominant musical elements: melody and harmony.[94]

In summary, as noted above, the formal and tonal practices established through the nineteenth century provide the foundation for Western popular music, which draws upon what may be called its prior art. The greater one's knowledge and understanding of this art, the better one's perception of what is original, what is not, and especially, what is borrowed. Further, the greater one's knowledge, the greater one's ability to distinguish between commonplace—that is, conventional—practice and the seemingly new or original application of long-established musical conventions of tonality.[95]

2. Historical Evolution of Tonality

Tracing this prior art back to its origins, one begins with the monophonic style of early Christian chant, which was a part of Christian liturgical music since at least the fourth century.[96] Its later expansion to include one or two more separate, but related, melodic voices organized around the primary chant was known as Organum.[97]

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90. *See Modes*, THE OXFORD DICTIONARY OF MUSIC, *available at* http://www.oxfordmusiconline.com.

91. *Dorian Mode*, THE OXFORD COMPANION TO MUSIC, *available at* http://www.oxfordmusiconline.com.

92. *Phrygian Mode*, THE OXFORD DICTIONARY OF MUSIC, *available at* http://www.oxfordmusiconline.com.

93. *See* William S. Rockstro et al., *Cadence*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com.

94. *See* Alexander L. Ringer, *Melody*, GROVE MUSIC ONLINE, http://www.oxfordmusiconline.com; *see also* Carl Dahlhaus et al., *Harmony*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com; *Melody*, THE OXFORD DICTIONARY OF MUSIC, *available at* http://www.oxfordmusiconline.com.

95. As the great director Alfred Hitchcock once observed, there are no new plots, no new characters, but only new personalities that make them seem new.

96. *See* SUZANNE LORD, MUSIC IN THE MIDDLE AGES: A REFERENCE GUIDE 25-27 (2008) (discussing forms of pre-Gregorian chant).

97. These additional voices, in contrast to the horizontal melodic concept of chant, typically formed the vertical and simultaneous intervallic sonorities of octaves, perfect fourths, or fifths. *See* BURKHOLDER ET AL., *supra* note 26, at 85-88. "The original chant melody is the *principal voice*, the other the *organal voice*, moving in exact parallel motion a fifth below. . . . In

Thus began the concept or effect of harmony—that is, a harmonious combination of simultaneous tones or melodies.[98] Diverging from the medieval practice of Organum, the fifteenth-century English composer John Dunstable and a few lesser-known composers conceived of the interval of a major third as consonant with the central pitch.[99] They thus planted the seeds for a primal concept of modality and its then-distant cousin, tonality (or key).[100]

The primary elements of Renaissance counterpoint up to and including the late sixteenth century became increasingly complex.[101] By the 1580s in Florence, a group of Renaissance scholars, artists, intellectuals, and classical musicians known as the Camerata attempted to revive ancient Greek drama, as they perceived it.[102] They, along with two principal singers and composers, Peri and Caccini, developed a musico-dramatic style of solo singing known as Monody.[103] Influenced by the simpler Renaissance styles in folk music, secular song, and dance, as well as the Renaissance's modal harmony, the concept of a separation and coordination of melody and harmony, or melody and accompaniment, was born.[104] This new style's texture, in contrast to the multi-voiced contrapuntal

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early organum, the organal voice is normally sung below the principal voice. Either or both voices may be doubled at the octave . . . to create an even richer sound." *Id.* at 88.

98. *See* Dahlhaus et al., *supra* note 94.

99. *See Third,* THE HARVARD DICTIONARY OF MUSIC 744 (Willi Apel ed., 2d ed. 1968) ("As an integral element of harmony the third appeared in the sixth-chord style of the 14th century; of melody, in the works of Dunstable, *c.* 1400 . . . . It may be noticed that, prior to 1500, the third was not admitted in the final chord.").

100. *See Key,* THE OXFORD DICTIONARY OF MUSIC, *available at* http://www.oxfordmusic online.com.

101. This increasing complexity was found in melodic shape, harmonic combinations, rhythmic diversity, and melodic/intervallic relationships (often a result of otherwise independent melodic lines) and can be traced to the advancement of the depiction of the text in religious and particularly in secular vocal compositions.

102. Bukofzer described the Camerata:

> This group based its attack on renaissance music on the handling of the words. They claimed that in contrapuntal music the poetry was literally "torn to pieces" (*laceramento della poesia*), because the individual voices sang different words simultaneously. . . . As a result of such theoretical discussions, the recitative was created, in which contrapuntal writing was altogether abandoned.

BUKOFZER, *supra* note 86, at 5.

103. *See* Nigel Fortune & Tim Carter, *Monody,* GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com.

104. Accompaniment can take a variety of forms:

> In the most general sense, the subordinate parts of any musical texture made up of strands of differing importance. A folksinger's listeners clap their hands in accompaniment to the song; a church organist keeps the congregation to the pitch and tempo with his or her accompaniment; the left hand provides the accompaniment to the right in a piano rag . . . .

Renaissance style, was known as homophonic.[105] Basic homophonic chordal structure then became more or less standard as a vertical simultaneity of the pitches of a major or minor third and a perfect fourth contained within the gravitational pitches of an octave.[106]

This new monodic style,[107] Stile Moderno,[108] fulfilled the dramatic necessity of comprehending the text as sung by solo singers and formed the basis for the early Italian madrigal as well as the earliest forms of opera.[109] The impetus to expand the musical language beyond the sober, religious texts of the Renaissance gave rise to freer musical and dramatic expression.[110] Yet the basic harmonic structures remained tonal or modal constructs of thirds encompassed within an octave.[111] With the exception of seventeenth-century modality, these tertian harmonic structures[112] form the basis of Western music from about 1700 to 1900, the Common Practice Period.[113] This tonal practice continued to play a prominent role in the music of the twentieth century as well, either largely intact or modified by contemporary practice, alongside various negations of the conventional tonal practices.[114]

David Fuller, *Accompaniment*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com.

105. *See Homophony*, THE OXFORD DICTIONARY OF MUSIC, *available at* http://www.oxfordmusiconline.com.

106. Modal modifications of this setup were also common; chordal progressions of these structures (chords/harmonies) were not standardized until the 1680s in Italy, in particular. By then the theoretical concept of key was well established and continues to this day. *See Key*, THE OXFORD DICTIONARY OF MUSIC, *available at* http://www.oxfordmusiconline.com.

107. *See* Fortune & Carter, *supra* note 103; Emma Wakelin, *Monody*, THE OXFORD COMPANION TO MUSIC, *available at* http://www.oxfordmusiconline.com.

108. *See Moderno Stile*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com.

109. *See* Wakelin, *supra* note 107.

110. Called upon to express such emotional and dramatic states as jealousy, suspense, passion, sexuality, death, murder, and pastoral languor, as required of Monteverdi's *Orfeo* (1607), for example, composers could explore a much freer, more varied use of dissonance, melodic shape, rhythm and chordal/harmonic movement.

111. Take, for example, the work of Monteverdi:

> Accepting the radical *stile rappresentativo* [monody] of the Florentines and infusing it with his intense pathos Monteverdi realized at the same time the dramatic possibilities . . . and the instrumental interlude, which the *Camerata* had discarded. . . . The pastoral and infernal spheres are sharply profiled in Monteverdi's music by coloristic means; the infernal regions are overshadowed by somber choruses in the lower register, dark brass instruments, and the reedy and nasal regal serving as continuo instrument.

See BUKOFZER, *supra* note 86, at 58-59.

112. *See Tertiary Harmony*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com.

113. *See* PISTON & DEVOTO, *supra* note 80.

114. *See infra* Part I.A.4.

By the end of the Baroque period (c. 1750), the demands of the highly evolving and progressive forms of opera; and other musical forms including: instrumental works such as symphonies,[115] sonatas,[116] and concertos;[117] large religious settings of the Mass; and other religious choral works influenced by opera, gave rise to even greater levels of harmonic complexity.[118] But major and minor (and, less often, modal) chord structures in root position, sequences, inversions of the chord structures, and modulation away from and back to the original key remained standard harmonic practice.[119] Again, the gravitational pull of tonality established a musical theory.

Even before the stupendous contrapuntal, harmonic, and formal expressive achievement of J.S. Bach, however, musical styles had begun to change.[120] The avowed seriousness of the German style, along with the French-Italian style, gave rise to the style of Gluck, Haydn, Mozart and early Beethoven, all of whom combined elements of both styles to form the Classical style (c. 1780–1805).[121] The expansion of key as well as the harmonic experimentation of Beethoven fostered a greater freedom of dissonance and gave rise to a bolder, heightened sense of tonality.[122] Following the Western social

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115. Jan Larue et al., *Symphony*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com.

116. Sandra Mangsen et al., *Sonata*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com.

117. Arthur Hutchings et al., *Concerto*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com.

118. *See Baroque*, THE OXFORD DICTIONARY OF MUSIC, *available at* http://www.oxfordmusiconline.com ("It was a period in which harmonic complexity grew alongside emphasis on contrast.").

119. The major expansion of the basic chord structure included the addition of a minor third above the second third, which is thus called a seventh chord. *See Seventh Chord*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com.

120. Commenting on the indefiniteness of historical periods in music, Pauly explained:

> [S]tylistic periods cannot be defined by exact dates. For the Classic period, this means that numerous manifestations of the new music's outlook and style appeared before the Baroque had spent its force. . . . The death of Bach in 1750 has often been chosen to symbolize the end of the Baroque era, but by the time Bach had composed the *Art of Fugue* [a defining work of Baroque polyphonic style], his son Carl Philipp Emanuel had already written keyboard sonatas in a distinctly new style.

REINHARD G. PAULY, MUSIC IN THE CLASSIC PERIOD 8 (4th ed. 2000).

121. *See Classical*, THE NORTON/GROVE CONCISE ENCYCLOPEDIA OF MUSIC 169 (Stanley Sadie ed., 1994) (describing the term "classical" as having multiple applications, but saying "its chief application is to the Viennese Classical idiom which flourished in the late 18th century and the early 19th, above all in the hands of Haydn, Mozart and Beethoven. . . . [M]ost of Gluck's 'reform' operas, composed at the beginning of this period, are based on classical subjects").

122. *See, e.g.*, LUDWIG VAN BEETHOVEN, *Symphony No. 3* (1804).

revolutions of the late eighteenth century, the fine arts championed individual freedom of expression.[123]

By the mid-nineteenth century and toward the late 1880s, the chromaticism of Wagner and Liszt had, at times, all but negated the feeling of key, particularly in *Tristan und Isolde* (1857–1859).[124] The seemingly free flight of a tonal center (key) and the far-reaching influence of Wagner's most chromatic work paved the way for the two major inroads into twentieth-century classical harmonic style: Impressionism and Expressionism.[125] Myriad examples of Wagner's appropriated style precede these inroads and may be found principally in Franco-German works and early Debussy.[126] German appropriation is manifested primarily in the works of Richard Strauss,[127] Mahler,[128] and early Schönberg.[129]

3. Modern Advancements in Traditional Tonal Practice

The first major inroad into twentieth-century classical harmonic style was Impressionism.[130] In late nineteenth-century France, traditional tonality was often altered to include the addition of major sevenths, ninths, elevenths, and thirteenths to the basic tonal chords.[131] These extended tertian structures were often treated as

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123. In the works of Schubert, Chopin, Schumann, Mendelssohn, Berlioz, and Liszt up to c.1850, traditional harmony is expanded in a variety of ways. The alteration of the inner voices, usually thirds or compounded thirds (ninths, elevenths, or thirteenths) infused otherwise traditional harmony with an unprecedented richness of emotional states, an intimacy of personal feeling beyond which words cannot penetrate. Added to this are the often-pervasive chromatic chord progressions (instead of or alongside the standard ones) to, away from, and back to the key. For a discussion of this period, see generally GRIFFITHS, *supra* note 42, at 177-89.

124. *See* Barry Millington, *Tristan und Isolde*, THE NEW GROVE DICTIONARY OF OPERA, *available at* http://www.oxfordmusiconline.com. Alfred Einstein further described the emblematic accomplishment of *Tristan and Isolde*:

> The harmony, moreover, in the predominantly chromatic inventiveness of motifs is more novel and refined. All the elements in this harmony—its suspensions, its alterations, and tensions—had been already present, individually, in Spohr, in Liszt, and even in Mozart. But in Wagner these elements, in a system that has turned into something very personal, have a new effect; with Tristan [and Isolde] one realm of harmony closes and a new one begins.

ALFRED EINSTEIN, MUSIC IN THE ROMANTIC ERA 238-41 (1947).

125. ROBERT GREENBERG, HOW TO LISTEN TO GREAT MUSIC: A GUIDE TO ITS HISTORY, CULTURE, AND HEART 296-97 (2011).

126. Examples include Debussy's *Beau Soir*, as well as his *Poèmes de Beaudelaire.*

127. *See* RICHARD STRAUSS, *Don Juan* (1888).

128. *See* GUSTAV MAHLER, *Fifth Symphony* (1902).

129. *See* ARNOLD SCHÖNBERG, *Gurrelieder* (1913).

130. *See* Richard Smith, *Impressionism*, THE OXFORD COMPANION TO MUSIC, *available at* http://www.oxfordmusiconline.com.

131. Salzman described those alterations:

consonant sonorities, not in need of resolution as dissonant or nonharmonic tones.[132] Traditional tertian structures in the music of Debussy, Ravel, and Fauré often include added major seventh or ninth chords as consonant (unresolved) intervals.[133] The latter is a practice often associated with the so-called jazz harmonies of Duke Ellington, Miles Davis, and many other jazz greats.[134]

A second major inroad into progressive twentieth-century tonal and harmonic advancement may be found in the Expressionistic[135] works of early Richard Strauss, Mahler, and Schönberg.[136] Heavily

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> Characteristic are chains of triads, of seventh, ninth or eleventh chords, or of related structures built on fourths or major seconds arranged in pentatonic, whole-tone, diatonic, or chromatic patterns, the last-named including free, sliding chromatic shifts based on "secondary function" chords but often arrived at through parallel or sequential motion.

ERIC SALZMAN, TWENTIETH-CENTURY MUSIC: AN INTRODUCTION 22 (4th ed. 2002).

132. *See Impressionism*, THE OXFORD DICTIONARY OF MUSIC, *available at* http://www.oxfordmusiconline.com. The hallmarks of impressionism are defined as follows:

> Some of the technical features of musical impressionism included new chord combinations, often ambiguous as to tonality, chords of the 9th, 11th, and 13th being used instead of triads and chords of the 7th; appoggiatura used as part of the chord, with full chord included; parallel movement in a group of chords of triads, 7ths, and 9ths, etc.; whole-tone chords; exotic scales; use of the modes; and extreme chromaticism.

See id.

133. Thus, in Debussy's *Afternoon of a Faun* (1894) are found progressions of parallel thirteenth chords, also known as chord streams (which may include parallel ninths or elevenths in parallel progressions). The further incorporation of whole-tone sonorities to this colorful palette produces a more vague sense of key whose tonal contours are blurred. This blurred suggestion of key parallels the Impressionist movement in French art and literature, which had begun about twenty years earlier. *See id.* The definition of impressionism mentions this parallel:

> Term used in graphic art from 1874 to describe the work of Monet, Degas, Whistler, Renoir, etc., whose paintings avoid sharp contours but convey an "impression" of the scene painted by means of blurred outlines and minute small detail. It was applied by musicians to the mus[ic] of Debussy and his imitators because they interpret their subjects (e.g. *La Mer*) in a similar impressionistic manner, conveying the moods and emotions aroused by the subject rather than a detailed tone-picture.

Id.

134. *See* PAUL F. BERLINER, THINKING IN JAZZ: THE INFINITE ART OF IMPROVISATION 73-74 (1994) (noting that jazz "chords typically include selective mixtures of the pitches of a major or minor triad (the first, third and fifth degrees of its related scale), the triad's diatonic upper extensions or tensions (its seventh, ninth, eleventh and thirteenth degrees), and the triad's altered extensions (its flatted-ninth, raised-ninth, raised-eleventh, and flatted-thirteenth degrees)").

135. *See* David Fanning, *Expressionism*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com.

136. As William Austin explained:

> Tonality in Mahler's music is peculiar. . . . Mahler himself never abandoned tonality; it is as strong a force in his last works as in his earliest. But it does not work in any of them as it does in Beethoven. . . . The harmony of *The Song of the Earth* is the most peculiar of all, and most convincing. . . . Mahler made ample use of pentatonic scales, and occasional use of a whole-tone scale, blending these smoothly into his diatonic and chromatic habits—so smoothly that their presence may easily be ignored; . . . there is

influenced by Wagner's pervasive chromatic style, these composers pushed levels of dissonance to an unprecedented degree.[137] Schönberg, in particular, composed in a style inaccurately dubbed "atonal," that is, music with no fixed tonal center.[138] Voicing of chords, density of texture (rhythmic and tonal), extreme ranges (both high and low), and an attempt to avoid or disguise tonal-sounding chords such as major or minor triads may suggest no traditional key center. But a close analysis may reveal a concealed concentration of a tonal center, if not a traditional sense of key.[139] Chords built in fourths may replace the traditional tertian structures.

Schönberg, on the other hand, believed that the breakdown or expansion of traditional tonality had run its course.[140] To this effect, he developed a style of composing called dodecaphonic, in which any or all twelve tones could function in effect as a kind of nontonal key.[141] Thus, composers avoided or de-emphasized structures built in thirds, octaves, and open fifths (the basic tenets of tonality) should they ever suggest traditional tonality.[142]

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nowhere any such obvious departure from Western norms as there is in Debussy or Puccini.

WILLIAM W. AUSTIN, MUSIC IN THE TWENTIETH CENTURY: FROM DEBUSSY THROUGH STRAVINSKY 127 (1966).

137. Fanning described the expressionist characteristics of one of Schönberg's works:

> 1909 was Schoenberg's expressionist annus mirabilis, the highpoint being Erwartung. The story of this one-act monodrama—that of a woman searching for her lover in a forest at night, finding his dead body, and in the course of her dementia virtually confessing to his murder—is again understandable on one level as a kind of personal catharsis. Schoenberg composed the music in a torrent of inspiration in 17 days, barely enough time to write down the notes of the extremely dense and refined score. The musical language is quintessentially expressionist in its avoidance of repetition and denial of stability in all parameters, including tempo. Harmony is chromaticized to the point where it forms a more or less static backdrop, in a constant state of flux and only occasionally falling back on more tonally reminiscent formations when the woman is in a state of emotional regression.

See Fanning, *supra* note 135.

138. Austin described Schönberg's deliberate new style:

> Schoenberg wrote a footnote, taking account of the label "atonal," which seemed to him absurd. He proposed a better label, if any label were needed—"pantonal," but he insisted that no label could substitute for a study of the facts. In spite of Schoenberg's protest . . . the word stuck as a label for Schoenberg's mature style.

AUSTIN, *supra* note 136, at 204-09.

139. *See* Chandler Carter, *Stravinsky's "Special Sense": The Rhetorical Use of Tonality in* The Rake's Progress, 19 MUSIC THEORY SPECTRUM 55, 59 (1997) ("Schoenberg saw himself . . . as having freed music from the shackles of tonality." (internal quotation marks omitted)).

140. Peter Kalkavage, *Music in the Modern Age*, THE FREE LIBRARY, http://www.thefreelibrary.com/Music%20in%20the%20Modern%20Age-a0120037483 (last visited Oct. 22, 2012).

141. *Dodecaphonic*, THE OXFORD DICTIONARY OF MUSIC, *available at* http://www.oxfordmusiconline.com.

142. Schönberg's primary early disciples, Berg and Webern, followed the same principles in their own way, with Berg incorporating more tonal interpolations within his dodecaphonic

Unlike Schönberg, Stravinsky did not believe that tonality was dead.[143] Like the French, Stravinsky flavored traditional tonal structures with chords of the added sixth, seventh, and ninth as consonance, rather than dissonance. Thus, there was no need for resolution in the traditional major or minor (or modal) triadic sonorities.[144] Along with Milhaud, Honegger, and Poulenc, Stravinsky wrote bitonal or polytonal structures as well.[145] Although levels of dissonance were often high, they were frequently based on combinations or mixtures of triadic tonal major, minor, or modal harmonies.[146] Prokofiev and Shostakovich, influenced as they were by the French, appropriated a similar usage.[147]

Both Stravinsky and Prokofiev lived in Paris at the height of this movement known as Neo-Classicism (c. 1918–1950s).[148] This movement in many ways paralleled the development of Cubism by Picasso, Braque, and others.[149] Just as artists looked at the natural world or the human figure from different angles at the same time—Picasso's groundbreaking *Les Demoiselles D'Avignon*, for example—these Neo-Classical composers regarded tonality in a related way.[150]

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sonorities. *See* SALZMAN, *supra* note 131, at 37-44.

143. *See* Carter, *supra* note 139, at 59 ("Stravinsky, on the other hand, invoked, shaped, and displayed tonal conventions in order to underscore other anachronistic musical gestures . . . .").

144. *See* IGOR STRAVINSKY, *The Rite of Spring* (1913).

145. *See* DARIUS MILHAUD, *La Création du Monde* (1923); ARTHUR HONEGGER, *Le Roi David* (1921, rev. 1923); FRANCIS POULENC, *Gloria* (1960).

146. *See* IGOR STRAVINSKY, *Symphony in Three Movements* (1945).

147. *See* SERGEY PROKOFIEV, *Waltz Finale*, Ballet Cinderella Act I (1944); DMITRY SHOSTAKOVICH, *Symphony No. 5* (1937).

148. *NeoClassicism*, THE OXFORD DICTIONARY OF MUSIC, *available at* http://www.oxfordmusiconline.com.

149. *See* PIERRE CABANNE, CUBISM 12 (Anne Zweibaum et al. eds., 2001) (discussing the approach Picasso took in creating *Les Demoiselles D'Avignon*); JOHN GOLDING, CUBISM: A HISTORY AND AN ANALYSIS 1907–1914, at 10, 17 (1968) (describing the use in Cubism of a "combination of several views of an object in a single image").

150. In *Symphony of Psalms*, Stravinsky looks at the key of C from different angles by beginning the work with an E minor chord, followed by a B-flat dominant seventh chord. The voicing of the E minor chord includes four Gs, the dominant of C. All these sonorities recur in quick succession. What do they have to do with the key of C? Looking cubistically at C from different tonally defining angles at the same time, the E of the E minor chord suggests the third of C, the incomplete beginning of a major triad. A B-flat dominant seventh suggests an incomplete reference to the key of E flat. E flat is the minor third of C. The second movement's final cadence is an E-flat major triad with an added sixth. The added sixth here is a C. Such quasi-cubistic techniques recur throughout the work. C major as a pure tonal triad, preceded by its modified dominant on G, does not occur until the last few bars of the piece, completing, so to speak, the cubistic picture of C. *See* STRAVINSKY, *Symphony of Psalms* (1939); SALZMAN, *supra* note 131, at 45-52.

After the death of Schönberg (1951), Stravinsky began to explore the twelve-tone technique.[151] Such post-World War II disciples as Babbitt, Boulez, Stockhausen, Nono, and many others also wrote in the style, but in addition to serializing pitch, or melody and harmony, they also serialized rhythm, tempo, meter, dynamics, and various other parameters to achieve total control.[152] Strict serialism enjoyed a shelf life of about three years, up to 1952. Its complexities were not suited to pop music.[153]

In contrast to the total control movement of serialism, a style developed known as "aleatoric."[154] Its leader, John Cage, advocated a music whose parameters were determined in a desultory fashion, that is, by chance (like throwing dice—the meaning of "alea").[155] Any nonsystem of melody, harmony, texture, or even nonmusic was accepted as valid by performers, who followed directives provided by the composer.[156]

The next major theoretical advancement (c. 1950s to the present) may be found in tape-recorded music and music that incorporates a computer to generate or organize sound.[157] Identified in French as *musique concrête*, tape recordings of sounds found in living nature (human voices, bird calls, animal sounds), in natural phenomena (waterfalls, waves crashing), or in daily life (car horns, tapping pencils) were manipulated to expand the world of sound.[158] Composers recorded these sounds at speeds faster or slower than normal.[159] The recordings might be played backwards or combined with various other manipulated tape recordings.[160] The practice of

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151. *See* Joseph N. Straus, *A Revisionist History of Twelve-Tone Serialism in American Music*, 2 J. SOC'Y FOR AM. MUSIC 355-56 (2008).

152. Paul Griffiths, *Serialism*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com ("[Babbitt, Boulez, Nono, and Stockhausen] and their colleagues sometimes extended serialism to elements other than pitch, notably duration, dynamics and timbre.").

153. *See id.*

154. Paul Griffiths, *Aleatory*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com.

155. *Id.* ("Chance procedures in composition have been most fully and diversely exploited by Cage. . . . [F]or example, he tossed coins to decide how he should make choices from charts of pitches, durations, intensities and other sound aspects . . . .").

156. This movement parallels the theatrical movement known as theatre of the absurd among such dramatists as Ionesco. It may blend aleatoric style with fixed compositional techniques. It may also combine several diverse disciplines such as dance, painting, speaking, film, video, playing or singing music, or silence. This 1960–70s style is known as mixed media or a happening. *See* SALZMAN, *supra* note 131, at 166-68.

157. *See* Lloyd Ultan, *Electronic Music: An American Voice*, *in* PERSPECTIVES ON AMERICAN MUSIC SINCE 1950, at 3, 5 (James R. Heintze ed., 1999).

158. SALZMAN, *supra* note 131, at 149-51.

159. *Id.*

160. *Id.*

musique concrête might or might not be combined with computer-generated sounds—that is, sounds not otherwise found in the natural world.[161]

4. Traditional Tonality in Contemporary Popular Music

Throughout the twentieth century, the predominant style of contemporary popular music, whether rock, folk, jazz, or country-western, follows the tenets of traditional tonality.[162] Jazz, the most complex of the popular idioms, put its own sophisticated stamp on the style. Its hundred-year-plus history began at the start of the twentieth century with the blues and traverses many diverse styles—from hot to swing to be-bop to progressive to cool and to various forms of fusion with other styles.[163] Its characteristic melodic and harmonic idiom often includes a half-step lowering of the third, fifth, and seventh, interchanged or combined with the corresponding diatonic intervals.[164] The roots of such tonal shading began with the earliest descendants of American slavery, primarily in gospel singing, chants, field calls, work songs, and eventually the blues.[165] Lowered intervals thus became widely known as the blue third, fifth, or seventh.[166] W.C. Handy's famous "St. Louis Blues" lyric, "I hate to see that evening sun go down," incorporates many such "blue" notes.[167]

Though jazz or pop may incorporate any other technique mentioned above, the relatively simple homophonic, tonal, and rhythmically clear styles of the Common Practice Period prevail.

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161. *Id.* at 149.

162. *See* AUSTIN, *supra* note 138, at 36 ("Meanwhile jazz transformed the popular music of European culture. It introduced rhythmic habits from Africa which eluded notation. It introduced new tone-colors. It left harmonic habits virtually unaffected. Debussy welcomed the beginning of this transformation.").

163. *See id.* at 181-89; *see also* Burnett James & Jeffrey Dean, *Jazz*, THE OXFORD COMPANION TO MUSIC, *available at* http://www.oxfordmusiconline.com ("Although many elements went into the making of jazz—ragtime, field hollers, work songs, spirituals, vaudeville songs, street marches, the blues, and so on—it developed its own distinctive character by about 1900.").

164. *See* Mark Tucker & Travis A. Jackson, *Jazz*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com ("Players began embellishing and ornamenting melodies, inventing countermelodies, weaving arpeggiated lines into the texture and enriching diatonic harmonies with blue notes.").

165. *See generally* MAUD CUNEY-HARE, NEGRO MUSICIANS AND THEIR MUSIC (1936) (tracing the evolution of African American music).

166. Gerhard Kubik, *Blue note (i)*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com ("It was already observed in the 1920s that blues and jazz singers, as well as instrumentalists tend to present the 3rd and 7th, sometimes also the 5th degree in a diatonic framework by pitch values a semitone lower, often with microtonal fluctuations.").

167. W.C. HANDY, *St. Louis Blues* (1914).

Neither the rock beat, nor its rhythms, nor the jazz harmonies, nor the primal quasi-minimalist techniques often in the forefront of pop style(s) can disguise their traditional origins. Yet a variety of particular elements may distinguish the myriad styles of contemporary or earlier popular music from classical. A brief overview of a few salient features may shed light on some of these distinctions.

In terms of instrumentation, the predominance of piano, bass, drums, clarinet, saxophone, trumpet, and trombone in various combinations (known as "combos") were unheard of in traditional classical chamber music, whose instrumentation consisted of a string quartet, woodwind quintet, or brass quintet.[168] Since the advent of rock, electric guitar and bass are more or less standard identifiers of style and timbre, more so than piano or acoustic guitar.[169] These may also be combined with synthesized sounds. The big band era from the 1930s onward featured an orchestra of about twenty, with saxophones, trumpets, trombones, and a rhythm section consisting of piano, bass, and drums.[170] Alternatively, a trio of piano, bass, and drums could function independently or in combination with a clarinet or saxophone, as well as a singer.[171]

A significant quality of much popular music entails improvisation, which results in variable renderings of melody, harmonization, and overall arrangement.[172] As far back as the Baroque Period, improvisation was a common practice (although

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168. The development of jazz explains the prevalence of these combos:

> While black songs, and another of their offspring, the blues, formed a basis for many of the instrumental techniques, others derived from brass- and wind-playing in the aftermath of the Civil War, when the military bands broke up and left many of their instruments lying around, battered and discarded, to be picked up by poor folk and used in street parades, funeral processions, and the like. When jazz went indoors it sometimes met the gentle but spirited bands of strings, piano, and drums with banjo or guitar playing the dance music of the day. . . . The "classic" jazz style, born of and in New Orleans, is essentially a linear, melodic music, played on trumpet, trombone, and clarinet with piano, drums, banjo or guitar, and bass . . . .

See James & Dean, *supra* note 163.

169. *See* Tucker & Jackson, *supra* note 164 ("The rich, brassy textures of big bands gave way to a leaner, more streamlined sound featuring vocals, one or two horns, electric guitar, bass and drums.").

170. *See* James Lincoln Collier, *Bands*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com ("The size of large bands increased steadily between 1935 and 1945, and a standard instrumentation of 4 trumpets, 4 trombones, 4 saxophones, and rhythm section was established. Later five saxophones became common, and eventually as many as nine or ten brass instruments were included.").

171. *Id.*

172. *See* Bruno Nettl et al., *Improvisation*, GROVE MUSIC ONLINE, *available at* http://www. oxfordmusiconline.com.

within the fixed limits of the score's melody and harmony).[173] In the modern day, complex elaborations of a melody are more common in jazz than in conventional popular music.[174] It is common practice to partially embellish an original theme by substituting other harmonically or melodically valid notes.[175] The great jazz singer Billie Holiday typically embellished the final cadence of a song by singing an intervallic second above the final note.[176] Today, many singers of various stylistic persuasions incorporate the gospel music practice of adding "melismas" (that is, improvised elaborations of a given melody) to sustained melodic notes, often called "rolling."[177] Influenced by Louis Armstrong and other jazz greats, singer Ella Fitzgerald used instrumental improvisatory techniques—in other words, she imitated the sound and style of a trumpet or saxophone as she improvised the given song melody.[178] This style dispenses with lyrics and is usually referred to as "scat singing."[179] Improvisation is also a key element in today's rap style, where performers often compose spontaneously and all but dispense with melody, resulting in a loosely-measured, quasi-incantatory, recitational vocal style supported by a driving rock instrumental base.[180]

Another important element of contemporary popular music has been the incorporation of the lively, characteristic rhythms of Latin America.[181] The various dance steps of the tango, samba, mambo, rhumba, and cha cha, for example, are reflected in their corresponding musical rhythms.[182] There is also typically an expanded rhythm

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173. *See id.*

174. *See id.*

175. *See id.*

176. James Lincoln Collier, *Billie Holiday*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com ("She was, however, a fine blues singer, as for example on *Fine and Mellow* . . . which she built around blue thirds descending to seconds to create an endless tension perfectly suited to the forlorn text.").

177. *See Melisma*, THE HARVARD DICTIONARY OF MUSIC 498 (Don Michael Randel ed., 4th ed. 2003).

178. *See* NORMAN DAVID, THE ELLA FITZGERALD COMPANION 85-89 (2004); STUART NICHOLSON, ELLA FITZGERALD: A BIOGRAPHY OF THE FIRST LADY OF JAZZ 100 (1993).

179. J. Bradford Robinson, *Scat Singing*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com.

180. *See Rap*, ENCYCLOPEDIA OF POPULAR MUSIC, *available at* http://www.oxfordmusiconline.com ("Rap is a term adopted from the jazz tradition, where it indicates 'speaking' or 'talking.'").

181. *See* Susan Thomas, *Latin American Music*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com ("Latin American genres and musical aesthetics have been at the heart of worldwide innovations in jazz, dance music, and hip hop . . . .").

182. *Id.* ("In the second half of the 20th century, musicians in the New York scene introduced a new Pan-Latin dance style that blended elements from Cuban *son* with a variety of Latin American dance genres . . . .").

section, which emphasizes the dance.[183] Inclusion of maracas, gourd, and various percussive and drum types is common.

In the contemporary era, the music itself has assumed a lesser role in popular musical presentations. Much of today's vocal pop music incorporates a theatrical staging of the song. It may include backup singers, dance steps, quasi-aerobic movement by any number of backup dancers, and stage effects (including theatrical lighting and video projections).[184] This style of presentation has at least as much to do with the visual as with the purely musical presentation. Michael Jackson incorporated any number of these elements in his concerts, stage shows, and videos.[185] Another case in point: The work of Lady Gaga is essentially about spectacle. This singer-songwriter ramps up the visual aspect of her style first by making a spectacle of herself through outrageous costuming and dance moves.[186] That she sings well in the midst of this media spectacle seems all but an afterthought.

If the music itself is of little significance, then the significance of legal rights in musical compositions diminishes. But the central importance of music has not entirely disappeared and may be enjoying a revival, thus revitalizing the importance of copyright infringement in music cases. In sharp contrast to music as spectacle, show, or some hybrid of performance art, the singer Adele—2012's Grammy winner for best song, album, and record—emerges as someone who is trying to rescue music for music's sake.[187] At the 2012 Grammy Awards, Adele stood wearing a simple black dress and singing into a microphone,

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183. *See id.*

184. Two scholars of popular music noted the diminished focus on the music itself:

> This shift happened in conjunction with a different one, a move from norms moulded by the demands of performance, often in intimate surroundings, to techniques designed for large-scale performance, often with the aid of amplification, or for recording, radio or film, and at the same time shot through with the effects of enormous changes in the resources and processes of sound production. This was accompanied too by a gradual transition from a relative separation of song and dance genres to a situation in which their attributes are thoroughly intertwined.

Richard Middleton & Peter Manuel, *Popular Music*, GROVE MUSIC ONLINE, *available at* http://www.oxfordmusiconline.com.

185. *See* Michael Jackson, *Thriller*, YOUTUBE (Oct. 2, 2010), http://www.youtube.com/watch?v=sOnqjkJTMaA; Michael Jackson, *Billie Jean*, YOUTUBE (Oct. 2, 2009), http://www.youtube.com/watch?v=Zi_XLOBDo_Y; Michael Jackson, *Grammy Performance 1988*, YOUTUBE (Sept. 14, 2007), http://www.youtube.com/watch?v=snjlNkl9PAA.

186. *See* Lisa Robinson, *In Lady Gaga's Wake*, VANITY FAIR, Jan. 2012, at 50 (describing Lady Gaga's evolution from struggling singer/songwriter to international style icon and mesmerizing performer).

187. James C. McKinley, Jr., *A Prayer, a Celebration and a Coronation*, N.Y. TIMES, Feb. 13, 2012, at C1.

reminding audiences that music is primarily aural, not visual.[188] With music itself becoming once again the primary focus, possible copyright infringement becomes more apparent. With other variables stripped away, one can discern more easily whether a song or other piece of music closely resembles an earlier work.

As tonality developed through centuries of the most common and effective use of chord progressions, resolutions of dissonance, melodic and harmonic shapes, and sequences with corresponding rhythms and accents, musicians followed a common standard. Only the greatest, most influential, and most original composers—that is, those composers who established and mastered what became convention—achieved major distinctions within their respective styles.[189] But they achieved those distinctions all within the gravitational pull of tonality.[190]

II. DEVELOPMENT OF COPYRIGHT DOCTRINE IN THE MUSICAL REALM

The founders of the United States contemplated federal statutory protection for expressive works, as evidenced by their inclusion of the Copyright and Patent Clause in the US Constitution.[191] Pursuant to that clause, the Founders gave Congress the power to grant authors exclusive rights in their writings for limited periods of time.[192] Congress swiftly enacted the Copyright Act of 1790, which protected books, maps, and charts from unauthorized publication, reproduction, and sale.[193] In 1831, Congress added musical compositions to the list of protected works.[194]

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188. *Id.*

189. *See Popular Chord Progressions*, Story Compositions, http://www.storycompositions.com/2008/06/popular-chord-progressions.html (last visited Sept. 18, 2012) (discussing popular chord progressions and harmonies, and songs that incorporate them).

190. The mastery of tonality in its earliest Classical incarnations in no way diminishes the achievement, value, significance, or beauty of the various pop styles of the twentieth and twenty-first centuries. In fact, many Classical composers were directly influenced by the lighter musical genres of their time, whether folk music, dance, jazz, or Gospel. *See* George Gershwin, *Piano Concerto in F Major* (1925) (including pervasive Charleston rhythms); Darius Milhaud, *The Creation of the World* (1923) (incorporating South American dance rhythms); MAURICE RAVEL, *Sonata for Violin and Piano*, Second Mvt., entitled *Blues* (appropriating a modified blues style).

191. U.S. CONST. art. I, § 8, cl. 8.

192. *Id.*; *see also* THE FEDERALIST NO. 43 (James Madison) (noting the desirability both for individuals and society of having copyright and patent protection).

193. *See* Copyright Act of 1790, ch. 15, § 5, 1 Stat. 124 (current version at 17 U.S.C. § 102 (2006) (providing for an initial copyright term of fourteen years with a renewal term of an additional fourteen years for books, maps, and charts)).

194. *See* Copyright Act of 1831, ch. 15, § 4, 4 Stat. 436 (current version at 17 U.S.C. § 102 (2006) (adding musical compositions to the list of protected works and extending the initial

Throughout the nineteenth century, the only physical embodiment of musical compositions was in the form of printed scores.[195] Phonograph records did not yet exist,[196] and tapes and compact discs were far in the future.[197] Because public performance of musical works did not infringe the copyright in the music,[198] composers earned revenue mainly through the sale of printed music.[199] All of that changed with the invention of piano rolls[200] and phonograph records.[201] In *White-Smith Music Publishing Co. v. Apollo Co.*, the US Supreme Court held that perforated rolls used to play copyrighted songs on player pianos were not infringing copies of the copyrighted musical compositions embodied in them.[202] Because only machines could "read" piano rolls, the rolls did not constitute the kind of forbidden "copies" contemplated by the federal copyright statute.[203] The holding in *White-Smith Music* carried with it a potentially devastating impact on composers. If copies readable only by machines did not infringe the composer's copyright, new technologies for fixing music that could largely supplant sheet music would leave composers with no exploitable market for their creations.

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copyright term to twenty-eight years)).

195. *Music Industry*, DICTIONARY OF AMERICAN HISTORY (3d ed. 2003).

196. Thomas A. Edison received the first patent for the phonograph on Feb. 19, 1878, but the mass production of the wax cylinders used as the recording media did not begin until after the turn of the century. *The History of the Edison Cylinder Phonograph*, THE LIBRARY OF CONGRESS, http://memory.loc.gov/ammem/edhtml/edcyldr.html (last visited Sept. 19, 2012).

197. *See* Frank da Cruz, *IBM 701 Tape Drive*, Columbia Univ. Computing History, http://www.columbia.edu/cu/computinghistory/701-tape.html (last visited Sept. 19, 2012) (discussing the emergence of audio recordings around the time of World War II); *Inventor of the Week: James T. Russell*, MIT Sch. of Eng'g, http://web.mit.edu/invent/iow/russell.html (last visited Sept. 19, 2012) (celebrating James Russell for inventing the digital compact disc).

198. Congress amended the Copyright Act in 1897 to provide that unauthorized public performance of a copyrighted musical work constituted an infringement of the copyright in the work and made the infringer liable for damages and injunctive relief. *See* Copyright Act of 1897, ch. 4, 29 Stat. 481 (current version at 17 U.S.C. § 106 (2006)).

199. John Stanley, *Classical Music: The Great Composers and Their Masterworks*, A WORLD HISTORY OF ART, http://www.all-art.org/history700_classical_music_1intr.html (last visited Sept. 19, 2012).

200. Player pianos and organs enjoyed popularity among the public from approximately 1890 to 1930. *See* SCHERER, *supra* note 8, at 38.

201. *See* Jon M. Garon, *Music as a Business: How to Make a Career Out of It*, GALLAGHER, CALLAHAN & GARTRELL, http://www.gcglaw.com/resources/entertainment/music-career.html (last visited Sept. 19, 2012) (discussing the popularity of player pianos and phonographs); *see also* WALTER L. WELCH & LEAH BRODBECK STENZEL BURT, FROM TINFOIL TO STEREO: THE ACOUSTIC YEARS OF THE RECORDING INDUSTRY 1877–1929 (1994) (providing an overview of the development of the phonograph and the recording industry).

202. White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 18 (1908).

203. *Id.* at 17.

Congress quickly reacted to the *White-Smith Music* decision by passing the Copyright Act of 1909, which specified that the mechanical parts used in a music-making machine to embody copyrighted musical compositions constituted an unauthorized reproduction of the copyrighted works.[204] In addition, suspicious of the fledgling recording industry, Congress introduced into copyright law the first compulsory statutory license.[205] Under this license, which applied only to musical compositions, after a copyright holder published his or her work via mechanical reproduction, any other person could make a recording of the same work without permission, provided that the second person paid a statutory royalty to the copyright holder.[206] Congress designed the license to increase the dissemination of music and to prevent the record industry from using its quasi-monopoly status to extract unduly large fees from those who might wish to record their own versions of copyrighted music.[207]

When faced with copyright infringement cases involving music, late nineteenth- and early twentieth-century judges relied on their own musical sensibilities.[208] Courts rarely used expert testimony, and juries seemed curiously absent.[209] Judge Learned Hand was famous for, among other things, his analytical dissection of musical works, in which he did an almost note-by-note comparison of the two songs at

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204. Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075 (current version at 17 U.S.C. § 110 (2006)).

205. *Id.* § 25(e).

206. *Id.*

207. *Music Licensing Reform: Hearing on Reform of § 115 of the Copyright Act Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 109th Cong. 1 (2005) (statement of Marybeth Peters, Register of Copyrights), *available at* http://www.copyright.gov/docs/regstat062105.html. In the early days of the recording industry, three companies dominated both the production of record players and phonograph media (discs or cylinders) and the recording of musical works—Columbia Phonograph Company, Edison Phonograph Company, and Victor Talking Machine Company. *See* WELCH & BURT, *supra* note 201, at 119-20 ("The patent situation in the United States enabled the three leading companies to keep the recording field all but closed to independent inventors or opportunistic interlopers.").

208. *See* Haas v. Leo Feist, Inc., 234 F. 105, 107 (S.D.N.Y. 1916) ("I rely upon such musical sense as I have."); Boosey v. Empire Music Co., 224 F. 646, 647 (S.D.N.Y. 1915) (adjudging the disputed works to be similar in their appeal based on the judge's own listening abilities as a member of "the uninformed and technically untutored public"); Blume v. Spear, 30 F. 629, 631 (C.C.S.D.N.Y. 1887) (concluding without any apparent expert testimony that the "theme or melody of the music is substantially the same in the copyrighted and the alleged infringing pieces").

209. *Compare* Marks v. Leo Feist, Inc., 290 F. 959, 960 (2d Cir. 1923) (referring to a music expert's affidavit in the record), *with Boosey*, 224 F. at 647 (determining similarity of contested work based on the judge's lay musical opinion without the input of an expert).

issue.[210] Not surprisingly, given the substantial revenue often at stake, the litigated cases invariably involved popular songs, as opposed to classical works.[211]

Throughout the first half of the twentieth century, courts deciding music infringement cases began to recognize the issues of access[212] and similarity[213] as the two key elements in such disputes. Because independent creation is a defense to infringement,[214] the courts acknowledged that a plaintiff must prove that the defendant had at least a plausible opportunity to see or hear the plaintiff's composition.[215] In addition, where evidence of the defendant's access to the plaintiff's work was weak, the courts allowed a plaintiff to counterbalance a weak showing of access with compelling proof that the two works were so similar that independent creation was unlikely.[216]

In 1946, the US Court of Appeals for the Second Circuit in *Arnstein v. Porter* synthesized the prevailing wisdom about access, similarity, expert testimony, and the role of juries into a framework for proving infringement that has become the model in many federal circuits.[217] In *Arnstein v. Porter*, the plaintiff, Ira Arnstein, was a composer with some commercial success who became convinced that any number of more successful composers were stealing his work and making considerable profits from it.[218] He instituted several copyright

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210. Arnstein v. Edward B. Marks Music Corp., 82 F.2d 275, 277 (2d Cir. 1936); Fred Fisher, Inc. v. Dillingham, 298 F. 145, 148 (S.D.N.Y. 1924); Hein v. Harris, 175 F. 875, 876 (C.C.S.D.N.Y. 1910).

211. *See, e.g.*, Cooper v. James, 213 F. 871 (N.D. Ga. 1914) (well-known Gospel Hymnals); *Blume*, 30 F. at 629 ("My Own Sweet Darling"); Reed v. Carusi, 20 F. Cas. 431 (C.C.D. Md. 1845) ("The Old Arm Chair").

212. *See Marks Music Corp.*, 82 F.2d at 275-76 ("The plaintiff's case depends upon access and similarity . . . ."); Wilkie v. Santly Bros., 13 F. Supp. 136 (S.D.N.Y. 1935).

213. *See Fred Fisher*, 298 F. at 147; *Haas*, 234 F. at 107; *Boosey*, 224 F. at 647; *Hein*, 175 F. at 877.

214. *See Marks Music Corp.*, 82 F.2d at 275 ("[I]ndependent reproduction of a copyrighted musical work is not infringement . . . .").

215. *See* Darrell v. Joe Morris Music Co., 113 F.2d 80, 80 (2d Cir. 1940) (noting weak evidence of access); Arnstein v. Twentieth Century Fox Film Corp., 52 F. Supp. 114, 114-15 (S.D.N.Y. 1943) (requiring access to the song in order for there to be copying, and holding that the plaintiff did not sustain his burden of proving access).

216. *See, e.g.*, Jewel Music Publ'g Co. v. Leo Feist, Inc., 62 F. Supp. 596, 598 (S.D.N.Y. 1945) ("Is the similarity of the two so great and so convincing that one may say that piracy exists and is found? If the answer is in the affirmative, then of course it necessarily follows that access may be inferred.").

217. Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946).

218. *See* B. MacPaul Stanfield, *Finding the Fact of Familiarity: Assessing Judicial Similarity Tests in Copyright Infringement Actions*, 49 DRAKE L. REV. 489, 489 (2001) ("He also believed plagiarists had deprived him of the rewards of his talent by infringing upon the copyrights to his compositions to their personal aggrandizement.").

infringement suits against fellow composers in the 1930s and 1940s,[219] all of which he lost, and which arguably betrayed a deteriorating mental state.[220] Although his lawsuits may be regarded as those of a malcontent crank, they produced an important body of copyright jurisprudence that remains influential in both music and nonmusic cases.[221]

In *Arnstein v. Porter*, Judge Frank declared that the two essential elements of any copyright infringement suit are copying and unlawful appropriation.[222] The plaintiff must first prove that the defendant did not independently create his or her own work but instead copied it from the plaintiff's.[223] The plaintiff may demonstrate copying through direct or circumstantial evidence.[224] Direct evidence could involve the defendant's admission of copying or perhaps eyewitness testimony of others who observed the defendant's process of composition.[225]

As direct evidence of copying is seldom available, most commonly, a plaintiff will rely on circumstantial evidence of copying.[226] The plaintiff would show that the defendant had access to the plaintiff's work and that a certain level of similarity exists between the two works.[227] On the issue of similarity, Judge Frank stated that "analysis ('dissection') is relevant, and the testimony of experts may be received to aid the trier of the facts."[228] In other words, experts may deconstruct a musical composition into its component parts—melody, harmony, rhythm, texture, and formal structure—and use their expertise to make informed comparisons about the resemblances between the two works according to music theory.[229]

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219. *See Porter*, 154 F.2d at 464; Arnstein v. Broad. Music, 137 F.2d 410 (2d Cir. 1943); *Marks Music Corp.*, 82 F.2d at 275; *Twentieth Century Fox Film Corp.*, 52 F. Supp. at 114; Arnstein v. Am. Soc. of Composers, Authors and Publishers, 29 F. Supp. 388 (S.D.N.Y. 1939).

220. Cary Ginell, *The Strange Case(s) of Ira Arnstein, Serial Litigator*, Music Reports, http://accounting.musicreports.com/smart_licensing/content_article.php?article_id=76 (last visited Sept. 18, 2012).

221. *Id.*

222. *Porter*, 154 F.2d at 468.

223. *Id.*

224. *Id.*

225. *See, e.g.*, Ulloa v. Universal Music & Video Distrib. Corp., 303 F. Supp. 2d 409, 412-13 (S.D.N.Y. 2004) (defendant admitted copying the plaintiff's vocal phrase but argued that it was not copyrightable).

226. *E.g.*, Ellis v. Diffie, 177 F.3d 503, 506 (6th Cir. 1999).

227. *Id.*

228. *Porter*, 154 F.2d at 468.

229. *See, e.g.*, M. Fletcher Reynolds, Selle v. Gibb *and the Forensic Analysis of Plagiarism*, http://www.musicanalyst.com/selle-v-gibb (last visited Sept. 18, 2012) (discussing the

Once plaintiffs have established copying, they must then show that the defendant illicitly appropriated their composition by taking its copyrightable elements.[230] On this issue, the court in *Arnstein v. Porter* stated that "the question . . . is whether [the] defendant took from [the] 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 [the] defendant wrongfully appropriated something which belongs to the plaintiff."[231] Judge Frank noted that the jury, composed as it is of ordinary listeners, is ideally suited to make such a determination.[232] At this juncture, the court stated, juries are to eschew analytical dissection and expert testimony.[233] The goal of any musical infringement case is to ascertain whether the defendant copied the protectable elements of the plaintiff's composition so that the defendant's song essentially supersedes the demand for the plaintiff's.[234] If the defendant's song is substantially similar to the plaintiff's, then the average lay listener (that is, the consuming public) might be inclined to purchase the former, particularly if it were available at a lower price than the latter.[235]

Because of the inherent subjectivity of discerning substantial similarity between two musical works, Judge Frank expressed his disapproval of summary judgment in music infringement cases.[236] He believed that the jury accurately reflected the listening capacities of the average lay listener and that judges should not substitute their inevitably idiosyncratic perception of the two compositions in dispute.[237] Even though the plaintiff's story in *Arnstein v. Porter* contained its improbable and "fantastic" portions, the court could not

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expert analysis of pitch, rhythm, and melody to determine similarity between two compositions in *Selle v. Gibb*).

230. *Porter*, 154 F.2d at 468.

231. *Id.* at 473.

232. *Id.*

233. *Id.* Curiously, however, Judge Frank suggested that experts may sometimes be employed at the illicit appropriation stage to "aid the jury in reaching its conclusion as to the responses of [lay] audiences." *Id.* Although it is not entirely clear what Judge Frank meant by this statement, it may be inferred that the experts may point out to the jury resemblances that flow not from the musical content of the two pieces but from the manner in which they are played, sung, or otherwise presented. *See id.*

234. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 587-88 (1993) (describing, in the context of fair use, whether a song meant to be a parody had effectively fulfilled the demand of the original).

235. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 4-5 (5th ed. 1998) (discussing the effect of price on product substitution).

236. *See Porter*, 154 F.2d at 471.

237. *See id.* at 473 ("Indeed, even if there were to be a trial before a judge, it would be desirable (although not necessary) for him to summon an advisory jury on this question.").

rule out the possibility that the defendant had plagiarized from the plaintiff's songs.[238] Once in a great while, summary judgment might be appropriate, and Judge Frank famously posed the hypothetical in which "Ravel's 'Bolero' or Shostakovitch's 'Fifth Symphony' [was] alleged to infringe 'When Irish Eyes are Smiling.'"[239] In that situation, the profound musical differences among the three compositions would preclude any possibility of copyright infringement.[240]

The requisite elements of a copyright infringement suit, as outlined in *Arnstein v. Porter*, have remained virtually unaltered to this day, particularly in the Second Circuit.[241] The Ninth Circuit separately developed its own formula for infringement actions based on an initial extrinsic analysis of the ideas of the two works followed by an intrinsic analysis based on the reactions of the ordinary lay observer.[242] Although the Ninth Circuit's terminology does not track *Arnstein v. Porter*, the notion of formally dissecting and comparing the disputed works with the aid of expert testimony and then having the trier of fact adjudge the similarity between them to the average lay person is common to both circuits.[243]

The Ninth Circuit first outlined its approach for assessing copyright infringement in *Sid & Marty Krofft Television Productions,*

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238. *See id.* at 469.

239. *Id.* at 473.

240. It is highly unlikely that composers of such high stature as Ravel and Shostakovitch would appropriate "When Irish Eyes are Smiling"—particularly without citing the borrowing or appropriation of the same. Any allegation of such appropriation begs at least two major questions: Why would Ravel, a French/Spanish composer, reference or even want to reference an Irish tune (with no otherwise-programmatic usage) in a quasi-nationalistic Spanish dance, the Bolero? Why would Shostakovitch, a Russian composer criticized by the Communist Central Committee as being too decadently Western (in his use of dissonance, formal complexity and overly esoteric style) and trying to get back into the good graces of the Stalinist regime in 1937, reference an Irish tune in his Fifth Symphony—a work that is clearly an overt paean to quasi-political Bolshevik Russian culture, particularly in its grand triumphant finale ending in D major? In any case, neither work in any way resembles, let alone suggests, infringement of the basic musical materials. No theme, no harmony, no formal element, and no musical analysis even vaguely suggests any such connection to the Irish tune.

241. Boone v. Jackson, 206 Fed. Appx. 30, 31 (2d Cir. 2006); Repp v. Webber, 132 F.3d 882, 889 (2d Cir. 1997); Gaste v. Kaiserman, 863 F.2d 1061, 1067-68 (2d Cir. 1988); Walker v. Time Life Films, Inc., 784 F.2d 44, 48 (2d Cir. 1986); Thayil v. Fox Corp., No. 11 Civ. 4791 (SAS), 2012 U.S. Dist. LEXIS 13669, at *11-12 (S.D.N.Y. Feb. 2, 2012). But the *Arnstein v. Porter* court's skittishness about granting summary judgment in copyright infringement cases has been criticized and largely supplanted by a more flexible approach. *See, e.g.*, Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1258 n.5 (2d Cir. 1986) ("The days of *Arnstein v. Porter* [regarding summary judgment] . . . are behind us.").

242. Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977), *superseded by statute*, Copyright Act of 1976, 17 U.S.C. § 504(b) (2006), *as recognized in* Dream Games of Arizona, Inc. v. PC Onsite, 561 F.3d 983 (9th Cir. 2009).

243. *Compare Krofft*, 562 F.2d at 1164, *with Porter*, 154 F.2d at 468.

Inc. v. McDonald's Corp.[244] Under *Krofft*'s first step, the "extrinsic test," the trier of fact must compare the plaintiff's and defendant's works to determine the similarity of their ideas—in other words, the basic concept or theme behind the works.[245] As in the Second Circuit's approach, the trier of fact engages in analytical dissection of both works and relies on expert testimony.[246] If the trier of fact finds substantial similarity of ideas, it then moves to the second step, the "intrinsic test," during which it examines the works as an ordinary observer without analytic dissection or use of expert testimony.[247] During this process, the trier of fact judges whether the two works have "substantial similarity in expressions . . . depending on the response of the ordinary reasonable person."[248]

Over time, the Ninth Circuit's approach to infringement has moved closer to that of the Second Circuit, especially with respect to the extrinsic test.[249] Recent Ninth Circuit decisions have allowed the trier of fact to determine substantial similarity of more than merely the "ideas" of the two works.[250] Extrinsic-test criteria for literary works, for example, include plot, theme, dialogue, mood, setting, pace, sequence of events, and characters.[251] But the Ninth Circuit has not expressly delineated the extrinsic elements of musical works, making the test difficult for the lower courts to apply.[252] Other circuits have

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244. *Krofft*, 562 F.2d at 1164-65; *see also* Olson v. Nat'l Broad. Co., 855 F.2d 1446, 1448-49 (9th Cir. 1989); Narell v. Freeman, 872 F.2d 907, 912 (9th Cir. 1989).

245. *See Krofft*, 562 F.2d at 1164 ("The determination of whether there is substantial similarity in ideas may often be a simple one. Returning to the example of the nude statue, the idea there embodied is a simple one—a plaster recreation of a nude human figure. A statue of a horse or a painting of a nude would not embody this idea and therefore could not infringe.").

246. Swirsky v. Carey, 376 F.3d 841, 845 (9th Cir. 2004).

247. *Krofft*, 562 F.2d at 1164.

248. *Id.* Although *Krofft* also referenced "the 'total concept and feel'" standard of comparison, *id.* at 1167 (quoting *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970)), later Ninth Circuit cases incorporated more explicitly the notion of comparing "the 'total look and feel of the works'" as part of the intrinsic test, *see Benay v. Warner Bros. Entm't, Inc.*, 607 F.3d 620, 624 (9th Cir. 2010) (quoting *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002) ("The 'intrinsic test' is a subjective comparison that focuses on 'whether the ordinary, reasonable audience' would find the works substantially similar in the 'total concept and feel of the works.'")).

249. *See* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03 [E][3][b][ii] (2012) (discussing the evolution of the extrinsic test in the Ninth Circuit).

250. *See id.* § 13.03 [E][3][b] (discussing the evolution of the Ninth Circuit standard for substantial similarity).

251. Shaw v. Lindheim, 919 F.2d 1353, 1356-57 (9th Cir. 1990); Litchfield v. Spielberg, 736 F.2d 1352, 1356 (9th Cir. 1984).

252. *See* Swirsky v. Carey, 376 F.3d 841, 849 (9th Cir. 2004) ("In analyzing musical compositions under the extrinsic test, we have never announced a uniform set of factors to be used. We will not do so now.").

adopted either the Second or Ninth Circuit approach, some with their own modifications.[253]

III. SPECIAL PROBLEMS IN MUSIC INFRINGEMENT CASES: ACCESS, SUBCONSCIOUS COPYING, INDEPENDENT CREATION, AND THE USE OF EXPERTS

Although the approach for proving copyright infringement first set forth fully in *Arnstein v. Porter* has become one of the standard frameworks for analyzing plagiarism cases involving all types of artistic creations, it has posed some thorny problems in disputes over musical compositions. Because music is the only creative work that appeals primarily to the ear rather than the eye, consumers absorb, appreciate, and retain music differently from plays, novels, visual art, and architectural works.[254] Studies have suggested that there is a particular area of the brain that comprehends and stores musical information.[255] In addition, the conventional tonal practices of Western music limit the combinations of notes that will sound pleasing or acceptable to the Western listener.[256] Finally, particular popular musical styles—for example, country-western, hip hop, rock, and blues—will dictate certain rhythms and musical motives.[257] Hence, expectations of the genre will further restrict the compositional choices.

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253. *See* Jones v. Blige, 558 F.3d 485, 490-91 (6th Cir. 2009) (applying its own test); Armour v. Knowles, 512 F.3d 147, 152 (5th Cir. 2007) (applying Second Circuit approach); Johnson v. Gordon, 409 F.3d 12, 17-18 (1st Cir. 2005) (applying Second Circuit approach); Taylor Corp. v. Four Seasons Greetings, LLC, 403 F.3d 958, 966 (8th Cir. 2005) (utilizing Ninth Circuit approach); Jacobsen v. Deseret Book Co., 287 F.3d 936, 942-943 (10th Cir. 2002) (applying a version of the Second Circuit approach); Dawson v. Hinshaw Music Inc., 905 F.2d 731, 734 (4th Cir. 1990) (utilizing Ninth Circuit approach); Peters v. West, 776 F. Supp. 2d 742 (N.D. Ill. 2011) (applying distinctive Seventh Circuit standard).

254. Obviously, plays, movies, and literary works that are performed have an aural as well as a visual element.

255. *See* ELENA MANNES, THE POWER OF MUSIC: PIONEERING DISCOVERIES IN THE NEW SCIENCE OF SONG 27-39 (2011) (describing various neuroscientific studies of music and the brain, including one that identified the rostromedial pre-frontal cortex as the primary area of the brain stimulated when one listens to music).

256. Since the time of the mathematician and philosopher Pythagoras in ancient Greece, it has been known that certain mathematical relationships dictate the consonance or dissonance of music. STUART ISACOFF, TEMPERAMENT: HOW MUSIC BECAME A BATTLEGROUND FOR THE GREAT MINDS OF WESTERN CIVILIZATION 26-42 (2003). For example, two tones vibrating at speeds in a 2:1 ratio will produce a sound most agreeable to the human ear; even a slight deviation from that ratio will be perceived as "grating and sour rather than placid." *Id.* at 35.

257. *See* DONALD J. GROUT & CLAUDE V. PALISCA, A HISTORY OF WESTERN MUSIC 752-53 (6th ed. 2001) (describing characteristics of rock, rhythm-and-blues, and country music).

In contrast to music, other creative works penetrate the human brain primarily through the optic system. Literary works, in particular, provide the opportunity for a measured perusal by the reader; in other words, readers dictate the pace at which they absorb the written page. With music, the composer and the performer present the listener with a finished composition to be played at a particular tempo.[258] Furthermore, because an artist has an enormous range of creative options in constructing a literary or dramatic work or a work of visual art or architecture, it is highly unlikely that one work will resemble another. A painter has literally hundreds of colors to choose from and dozens of media in which to render a work. A novelist has tens of thousands of words to use in an innumerable variety of formulations.[259]

These peculiar characteristics of music bear significantly on certain important issues surrounding copyright infringement—in particular, access, subconscious copying, independent creation, and the use of expert testimony in litigation. Courts should be aware of music's unique qualities when shaping the legal doctrine governing infringement disputes to ensure that plaintiff composers can adequately protect themselves from plagiarism and defendant composers can fend off unjustified attacks on their authorial integrity.

A. Access to the Plaintiff's Composition

Under the first prong of the *Arnstein v. Porter* approach for proving copyright infringement, the plaintiff must show that the defendant copied from the plaintiff's work.[260] Direct evidence of copying, the courts rightly note, is rarely available.[261] Hardly ever do eyewitnesses come forward to testify that they observed the defendant

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258. *See* ARNOLD SCHOENBERG, THE MUSICAL IDEA AND THE LOGIC, TECHNIQUE, AND ART OF ITS PRESENTATION 111 (Patricia Carpenter & Severine Neff eds. & trans., 1995) ("Since music is intended (primarily) for listening (and only secondarily for reading) and through its tempo so determines the course of ideas and problems that a protracted lingering over a misunderstood idea becomes impossible . . . every idea must be presented so that the listener's power of comprehension can follow it.").

259. Although it has long been acknowledged that there are only so many distinct plotlines in Western literature, an author has an almost unending variety of ways in which to develop and express them.

260. Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946); *see also* Selle v. Gibb, 741 F.2d 896, 901 (7th Cir. 1984) ("Proof of copying is crucial to any claim of copyright infringement because no matter how similar the two works may be (even to the point of identity), if the defendant did not copy the accused work, there is no infringement.").

261. JCW Invs., Inc. v. Novelty, Inc., 482 F.3d 910, 915 (7th Cir. 2007); Smith v. Jackson, 84 F.3d 1213, 1218 (9th Cir. 1996); Lipton v. Nature Co., 71 F.3d 464, 471 (2d Cir. 1995); Tisi v. Patrick, 97 F. Supp. 2d 539, 546 (S.D.N.Y. 2000).

composer lifting passages from the plaintiff's work and dropping them into the defendant's own composition, and it is highly unusual for a defendant to admit copying.[262] Therefore, most plaintiffs must establish copying through circumstantial evidence, by which they show that the defendant had access to their work and that there is probative similarity between the disputed works.[263] Probative similarity between the two works means that the defendant's work contains similarities to the plaintiff's work that can be explained only by copying as opposed to common use of public domain materials or coincidence.[264] Plaintiffs typically establish probative similarity through the testimony of experts who dissect the two works and seek to determine whether the works are similar in their musical construction.[265] In addition, many courts apply an inverse-ratio rule to the relationship between access and probative similarity—with a strong showing of access, a weaker showing of similarity will suffice, and vice versa.[266]

Generally, the plaintiff must show that the defendant had access to the plaintiff's work to establish copying in the absence of direct evidence.[267] Where musical works are involved, plaintiffs ordinarily rely on either a "chain-of-events" theory or a wide-dissemination theory to establish access.[268] Under the "chain-of-events" theory, plaintiffs attempt to prove that their music as embodied in some medium (printed score, digital format, cassette tape, or compact disc) was given to someone and then passed through

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262. Occasionally, defendants admit copying the plaintiff's work but then argue that the copying was lawful under the *de minimis* doctrine, fair use, or some other defense. *See, e.g.*, Jarvis v. A & M Records, 827 F. Supp. 282, 288 n.2 (D.N.J. 1993) (noting that "copying is admitted at the outset" in sampling cases).

263. *E.g.*, Armour v. Knowles, 512 F.3d 147, 152 (5th Cir. 2007).

264. For the seminal article on probative similarity, see Alan Latman, *"Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement*, 90 COLUM. L. REV. 1187 (1990).

265. Although several elements, such as melody, harmony, rhythm, tempo, and texture, contribute to a finished musical product, the cases and the experts tend to emphasize similarities in melody as the most probative of copying. *See* Johnson v. Gordon, 409 F.3d 12, 21 (1st Cir. 2005); Swirsky v. Carey, 376 F.3d 841, 845 (9th Cir. 2004); Calhoun v. Lillenas Publ'g, 298 F.3d 1228, 1232 (11th Cir. 2002).

266. Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000); Shaw v. Lindheim, 919 F.2d 1353, 1361-62 (9th Cir. 1990); Aldon Accessories Ltd. v. Spiegel, Inc., 738 F.2d 548, 553-54 (2d Cir. 1984).

267. *E.g.*, Data Gen. Corp. v. Grumman Sys. Support Corp., 825 F. Supp. 340, 355 (D. Mass 1993).

268. *See* Selle v. Gibb, 741 F.2d 896, 901 (7th Cir. 1984); Peters v. West, 776 F. Supp. 2d 742, 748 (N.D. Ill. 2011).

one or more hands to reach the allegedly infringing defendant.[269] The bare possibility of access, however, will not suffice, nor will the suggestion of access through speculation or conjecture.[270]

Where the plaintiffs have submitted their works to music publishers and record labels, they often can satisfy the chain-of-events theory and establish a reasonable possibility of access through the corporate-receipt doctrine. Under this doctrine, if the defendant is a corporation, the receipt of the plaintiff's work by one of the defendant's employees constitutes receipt by the employee who actually composed the accused work, so long as there is some connection between the two employees.[271] Courts and commentators variously define this relationship as "physical propinquity,"[272] a "nexus," a "connection," or "crossed paths."[273] Merely showing that the corporation received the plaintiff's work is not enough to establish access.[274] There must be some reasonable possibility that the plaintiff's composition found its way into the defending composer's hands.

Apart from a "chain-of-events" theory, plaintiffs can attempt to show that defendants had the necessary access through a theory of widespread dissemination. Traditionally, plaintiffs employing this theory would demonstrate that their musical works were widely distributed through extensive radio or television airplay or record sales.[275] In the contemporary context, courts have added dissemination via the Internet to the mix, making practically any

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269. *Three Boys Music Corp.*, 212 F.3d at 482 (noting that access is shown where "a particular chain of events is established between the plaintiff's work and the defendant's access to that work (such as through dealings with a publisher or record company) . . . .").

270. Armour v. Knowles, 512 F.3d 147, 153 (5th Cir. 2007) ("Reasoning that amounts to nothing more than a 'tortuous chain of hypothetical transmittals' is insufficient to infer access." (quoting Bouchat v. Balt. Ravens, Inc., 241 F.3d 350, 354 (4th Cir. 2001))).

271. *See* Jones v. Blige, 558 F.3d 485, 492-93 (6th Cir. 2009); Moore v. Columbia Pictures Indus., Inc., 972 F.2d 939, 942 (8th Cir. 1992); Intersong-USA v. CBS, Inc., 757 F. Supp. 274, 281 (S.D.N.Y. 1991).

272. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.02[A] (2010).

273. Lee S. Brenner & Allison S. Rohrer, *The Bare Corporate Receipt Doctrine*, 24-WTR COMM. LAW. 3 (2007).

274. Jorgensen v. Epic/Sony Records, 351 F.3d 46, 48 (2d Cir. 2003) ("Bare corporate receipt . . . without any allegation of a nexus between the recipients and the alleged infringers, is insufficient to raise a triable issue of access."); *see also* Stacy Brown, *The Corporate Receipt Conundrum: Establishing Access in Copyright Infringement Actions*, 77 MINN. L. REV. 1409, 1411-12 (1993) ("[C]ourts have recently held that the plaintiff must provide additional evidence showing a relationship between the employee who received the submission at the company and the employee who allegedly copied it.").

275. *See* Palmieri v. Defaria, 88 F.3d 136, 137 (2d Cir. 1996); ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 998 (2d Cir. 1983); Acuff-Rose Music, Inc. v. Jostens, Inc., 988 F. Supp. 289, 293 (S.D.N.Y. 1997).

piece of music available (legally or illegally) with a mouse click.[276] Because access is predicated upon the defendant's having a "reasonable opportunity" to see or hear the plaintiff's work, an alleged infringer would have almost presumptive access to music that is readily available on the Internet.[277]

Despite their best efforts, however, some plaintiffs in copyright infringement cases cannot establish access as a factual matter. In other words, they cannot present satisfactory proof that the defendant saw or heard the plaintiff's work through a chain of custody or through widespread dissemination.[278] In such situations, the courts have allowed striking similarity between the two works to serve as a substitute for access or as an inferential basis for access.[279] The majority of courts hold that striking similarity is evidence of access but that plaintiffs still must prove that the defendant had access to their work.[280] A minority of courts, however, suggest that striking similarity is presumptive proof of access.[281] In other words, if the two works are so similar that it is virtually impossible for the defendant to have created his or her work without copying from the plaintiff, then the defendant obviously had the opportunity to view and copy the plaintiff's work.

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276. *See* David Nimmer, *Access Denied*, 2007 UTAH L. REV. 769, 781-82 (cautioning that widespread Internet dissemination of works may effectively eliminate the "safeguard of access" and that, as a result, "a witch's brew threatens to swallow traditional copyright safeguards").

277. *See* Karen Bevill, Note, *Copyright Infringement and Access: Has the Access Requirement Lost Its Probative Value?*, 52 RUTGERS L. REV. 311, 312 (1999) ("[T]he access requirement has lost much of its force in light of the rise of Internet use, in particular, digital music downloading.").

278. *See* Selle v. Gibb, 741 F.2d 896, 902 (7th Cir. 1984) ("The greatest difficulty perhaps arises when the plaintiff cannot demonstrate any direct link between the complaining work and the defendant but the work has been so widely disseminated that it is not unreasonable to infer that the defendant might have had access to it.").

279. *Id.* ("Thus, 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.").

280. *See id.* at 901 ("[S]triking similarity is just one piece of circumstantial evidence tending to show access and must not be considered in isolation; it must be considered together with other types of circumstantial evidence relating to access."); Stewart v. Wachowski, 574 F. Supp. 2d 1074, 1098 (C.D. Cal. 2005).

281. *See* Jones v. Blige, 558 F.3d 485, 491 (6th Cir. 2009) ("A lesser showing of access (or even no showing at all) will suffice where the works are 'striking[ly]' similar, strongly suggesting that copying occurred."); Peel & Co. v. Rug Mkt., 238 F.3d 391, 395 (5th Cir. 2001) ("In this court, '[i]f the two works are so *strikingly* similar as to preclude the possibility of independent creation, 'copying' may be proved without a showing of access.'"); Ferguson v. Nat'l Broad. Co., 584 F.2d 111, 113 (5th Cir. 1978) ("Even without proof of access, plaintiff could still make out her case if she showed that the two works were not just substantially similar, but were so strikingly similar as to preclude the possibility of independent creation.").

A closer comparison of the majority and minority rules regarding access and striking similarity, however, reveals that the differences between them are less meaningful than at first glance. One court applying the majority rule stated that "striking similarity is one way to demonstrate access."[282] In the same vein, a court applying the minority rule declared that the plaintiff "must produce evidence of access, all right, but . . . a similarity that is so close as to be highly unlikely to have been an accident of independent creation *is* evidence of access."[283] At some point then, the majority and minority approaches appear to converge. Both approaches apparently concede that the plaintiff must prove that the defendant had access to the plaintiff's work but may use striking similarity between the two works as the only evidence of access.[284]

B. Subconscious Copying and Independent Creation

Closely related to the issue of access is the concept of subconscious copying. Independent creation is a defense to copyright infringement; even if defendants produce a work identical to that of plaintiffs, if they did so autonomously, without copying from the plaintiff's work, there is no actionable infringement.[285] Ordinarily, infringing defendants will be well aware that they are purloining material from the plaintiff's work. In some instances, defendants may mistakenly believe that they have the legal right to appropriate some or all of the plaintiff's creation—for example, if they think that the plaintiff's work has passed into the public domain or that the elements that they are borrowing are unprotectable.[286] But even in these circumstances, the defendants are undoubtedly aware that they are borrowing from someone else.

In a few cases, however, courts in copyright infringement cases have identified the phenomenon of subconscious copying and used it as a basis for finding liability. As early as 1924, in *Fred Fisher, Inc. v.*

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282. Bouchat v. Balt. Ravens, Inc., 228 F.3d 489, 494 (4th Cir. 2000).

283. Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1170 (7th Cir. 1997).

284. *See* Armour v. Knowles, 512 F.3d 147, 156 n.3 (5th Cir. 2007) (citing with seeming approval the majority rule on access stated in *Selle v. Gibb* despite being a minority rule court); *Stewart*, 574 F. Supp. 2d at 1098 (discussing the split among the circuits on "striking similarity").

285. *See Selle*, 741 F.2d at 904; Nichols v. Universal Pictures Corp., 45 F.2d 119, 122 (2d Cir. 1930).

286. *See, e.g.*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 343-44, 364 (1991) (holding the material in a telephone directory unprotectable where the defendant, in creating its regional directory, purposely copied entries from the plaintiff's local directory, undoubtedly believing the material was unprotectable).

Dillingham, Judge Learned Hand observed that the defendant composer had probably subconsciously copied the ostinato of his composition from the plaintiff's work.[287] Given the apparent recent success of the plaintiff's song, Judge Hand believed it likely that the defendant, himself a successful composer, had heard the plaintiff's work, stored the ostinato accompaniment in his memory, and later inadvertently used it in his own composition.[288] The defendant denied having consciously borrowed the ostinato from the plaintiff's song, and Judge Hand found his denials credible.[289] Because of the virtual identity of the two accompanimental figures and the absence of a common prior source, however, the court felt constrained to find infringement.[290] The defendant's "innocence" or lack of willful intent can certainly shield him from enhanced damages but has no bearing on the question of whether he unlawfully appropriated the plaintiff's original expression.[291]

Almost sixty years later, the Second Circuit reiterated that subconscious copying constitutes copyright infringement.[292] In *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, former Beatle George Harrison was accused of infringing the plaintiff's song "He's So Fine" in the creation of his song "My Sweet Lord."[293] In light of the popularity and wide distribution of the plaintiff's song and the telling similarities between the melodies and structures of the two works, the court upheld the lower court's finding of infringement.[294] Although admitting that he had heard the plaintiff's song at some time in the past,[295] Harrison testified extensively about his autonomous process of composition and his lack of reliance on any other musical works.[296]

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287. Fred Fisher, Inc. v. Dillingham, 298 F. 145, 147 (S.D.N.Y. 1924).

288. *Id.*

289. *Id.*

290. *Id.* at 152. Judge Hand thought that the dispute was "'a trivial pother' . . . a mere point of honor, of scarcely more than irritation, involving no substantial interest." *Id.* (citing Jeweler's Circular Publ'g Co. v. Keystone Publ'g Co., 281 F. 83, 95 (2d Cir. 1922) (Hough, J., dissenting)).

291. *Id.* at 148; *see also* N. Music Corp. v. Pacemaker Music Co., No. 64 Civ. 1956, 1965 U.S. Dist. LEXIS 6864, at *3 (S.D.N.Y. Nov. 5, 1965) ("[I]f copying did in fact occur; [sic] it cannot be defended on the ground that it was done unconsciously and without intent to appropriate plaintiff's work.").

292. ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 999 (2d Cir. 1983).

293. *Id.* at 990.

294. *Id.* at 999.

295. "He's So Fine" was released in 1963 and became an instant hit in both the United States and the United Kingdom. *Id.* at 997-98. Harrison recalled hearing the song around the time of its release. He composed "My Sweet Lord" six years later. *Id.*

296. *See* Bright Tunes Music Corp. v. Harrisongs Music, Ltd., 420 F. Supp. 177, 179 (S.D.N.Y. 1976) (setting forth portions of Harrison's testimony in which he described working

But his testimony was for naught, as the district court found that Harrison had unwittingly copied the melody for his song from the plaintiff's melody.[297]

Almost two decades later, the Ninth Circuit in *Three Boys Music Corp. v. Bolton* affirmed a jury verdict against the defendant singer-songwriter Michael Bolton in favor of the rights holder to the song, "Love Is a Wonderful Thing," composed by the Isley Brothers in 1964.[298] Bolton asserted that he had independently composed his song, also entitled "Love Is a Wonderful Thing," in 1990.[299] The court acknowledged that the defendant must have subconsciously, rather than intentionally, relied on the Isley Brothers' song, given the similarities between the two works.[300] Nonetheless, the court affirmed the defendant's liability, holding that deliberate copying is not required for a finding of infringement.[301]

In contrast to *ABKCO Music*, access in *Three Boys Music* was much more tenuous, and the similarities between the two songs not as great. In fact, Bolton had no recollection of having heard the plaintiff's song, which was not released on compact disc until 1991, one year after Bolton composed his song.[302] The jury's finding of access was apparently predicated on radio and television airplay in the mid-1960s when Bolton was a teenager and on Bolton's admitted longstanding admiration of the Isley Brothers and their music.[303] Although Bolton's exposure to the plaintiff's song was twenty-five years before he wrote his own song, the court ruled that the jury was entitled to find that he copied from the plaintiff.[304]

Judicial recognition of subconscious copying as the basis for finding infringement seems predicated on the notion that copying is copying, whether done intentionally or innocently. But, one might argue, the composition process is not so neatly cabined. Earlier works inevitably influence all creators of artistic works. In the musical realm, where the defendant composers might have heard many different musical phrases over a period of many years and stored them

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with US gospel singer Billy Preston and others to develop the music and lyrics for "My Sweet Lord").

297. *Id.* at 180.

298. Three Boys Music Corp. v. Bolton, 212 F.3d 477, 480, 489 (9th Cir. 2000). The jury awarded the plaintiff $5.4 million in damages. *Id.* at 480.

299. *Id.* at 481, 486. Bolton's song became a pop hit in 1991 and finished the year at number forty-nine on Billboard's end-of-the-year pop chart. *Id.*

300. *Id.* at 482-83.

301. *See id.* at 486.

302. *Id.* at 487.

303. *Id.* at 483-84.

304. *Id.* at 486.

in their brains, it is debatable whether they are engaged in "independent" creation when putting down notes on the page or working up a piece on a keyboard. All Western musical compositions draw to a large extent on earlier works, are grounded in a common vocabulary, and must sound pleasing or acceptable to the human ear, at least to some degree. Because all composers work in this fashion, some element of subconscious copying may exist in almost all works.[305] One interesting aspect of the subconscious copying cases is that those collaborating with any of these defendants in composing, arranging, performing, and producing the disputed musical work apparently did not point out to the defendant that his work might infringe an earlier piece. If the similarity was so palpable, why would no one have spoken up before the defendant's composition was published and attacked?

Independent creation has been a defense to copyright infringement since at least the early twentieth century. In 1910, Judge Learned Hand suggested that the defendant composer of a song substantially similar to the plaintiff's could be found liable for copyright infringement even though he had never heard the plaintiff's composition.[306] Judge Hand's comment implied that novelty, not originality, was the touchstone of copyright protection.[307] But by 1936, Judge Hand had changed his opinion and embraced independent creation as a defense to infringement.[308] Although judges have occasionally sought to replow the novelty furrow,[309] the case law still recognizes originality as the essence of protectable expression.[310] Composers sitting alone in their studios drawing upon their own training and imagination theoretically can produce an original work that not only is copyrightable, but will also not infringe an identical

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305. In one interesting case, the defendant successfully proffered the independent creation defense by providing witnesses who observed him spontaneously creating the allegedly plagiarized song in the middle of a church service. Calhoun v. Lillenas Publ'g, 298 F.3d 1228, 1233-34 (11th Cir. 2002). Although there was some evidence of access (though a bit weak), the court never really considered the possibility that the defendant in his "spontaneous" creation was subconsciously copying from the plaintiff's earlier song, which was almost identical to the defendant's. *See id.*

306. Hein v. Harris, 175 F. 875, 876 (C.C.S.D.N.Y. 1910).

307. *See id.*

308. Arnstein v. Edward B. Marks Music Corp., 82 F.2d 275, 275 (2d Cir. 1936) ("[I]ndependent reproduction of a copyrighted musical work is not infringement; nothing short of plagiarism will serve.").

309. *See* Lee v. Runge, 404 U.S. 887, 893 (1971) (Douglas, J., dissenting) (arguing for use of novelty standard for both copyrights and patents).

310. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) ("The *sine qua non* of copyright is originality."); Silverstein v. Penguin Putnam, Inc., 368 F.3d 77, 80 (2d Cir. 2004); Satava v. Lowry, 323 F.3d 805, 810 (9th Cir. 2003).

work created earlier by another. The inherent tension between subconscious copying and independent creation thus flows from the difficulty of determining how truly independent composers' efforts are when their minds are filled with snatches and phrases of (in some cases) hundreds of earlier works and when some of those shorter or longer fragments may be imported into a theoretically "new" work.

C. The Use of Experts in Music Infringement Litigation

The use of expert testimony in music infringement litigation over time tracks a pendulum swing more than a straight line. As early as the mid-nineteenth century, US courts recognized the difficulties confronting lay judges and juries in determining whether two musical works were substantially similar in a musicological sense.[311] Courts referenced the need to incorporate expert opinions into the litigation process.[312] Music experts could assist in dissecting the two musical compositions and ascertaining whether the melodic, harmonic, and rhythmic elements suggested copying or independent creation.[313] They could also place the compositions in a historical context and describe their public domain antecedents.[314]

But by the early twentieth century, references to expert testimony in music infringement cases were rare, and several judges seemingly took pride in relying on their own musical sensibilities to determine plagiarism.[315] Because infringement turned on whether the

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311. Several judicial opinions reveal a marked lack of understanding by judges of the fundamentals of music. *See, e.g.*, N. Music Corp. v. King Record Distrib. Co., 105 F. Supp. 393, 400 (S.D.N.Y. 1952) (incorrectly equating rhythm and tempo); Fred Fisher, Inc. v. Dillingham, 298 F. 145, 147 (S.D.N.Y. 1924) (erroneously describing the accompaniments in the disputed works as "ostinato"); Boosey v. Empire Music Co., 224 F. 646, 647 (S.D.N.Y. 1915) (incorrectly referring to ragtime as syncopated "time" as opposed to rhythm); *Hein*, 175 F. at 876 (erroneously asserting that the disputed works were in minor as opposed to major keys).

312. *See, e.g.*, Marks v. Leo Feist, Inc., 290 F. 959, 960 (2d Cir. 1923) (referring to an expert's analysis of the disputed works); Jollie v. Jaques, 13 F. Cas. 910, 914 (C.C.S.D.N.Y. 1850) ("Persons of skill and experience in the art must be called in to assist in the determination of the question.").

313. *See* Michael Der Manuelian, Note, *The Role of the Expert Witness in Music Copyright Infringement Cases*, 57 FORDHAM L. REV. 127, 145-46 (1988) ("Without the benefit of expert analysis and dissection, the factfinder is ill-equipped to distinguish [similarities that relate to copyrightable material from those that result from a common source or common musical form instead of copying].").

314. *See* Reply Decl. of Lawrence Ferrara, Straughter v. Raymond, No. CV 08-2170 CAS (CWx), 2011 U.S. Dist. LEXIS 93068 (C.D. Cal. Aug. 19, 2011) (No. 242-9) (discussing the historical antecedents of the disputed works).

315. Haas v. Leo Feist, Inc. 234 F. 105, 107 (S.D.N.Y. 1916) ("I rely upon such musical sense as I have."); *Boosey*, 224 F. at 647 (adjudging the disputed works to be similar in their appeal based on the judge's own listening abilities as a member of "the uninformed and technically untutored public"); Blume v. Spear, 30 F. 629, 631 (C.C.S.D.N.Y. 1887) (concluding

two musical works were substantially similar to the ear of the average lay listener, judges in bench trials apparently believed that their ears were as good, if not better, than those of ordinary listeners.[316] If two songs sound alike, they must be alike for infringement purposes, assuming that the defendants did not independently create their compositions.[317]

By the time the Second Circuit corralled the disparate parts of infringement analysis and put forward a coherent analytical framework in *Arnstein v. Porter* in 1946, the use of experts had become essential. The "copying" phase of the *Arnstein v. Porter* framework required a determination of whether the defendant had "copied" his or her work from the plaintiff's, which in turn necessitated a showing that the defendant had access to the plaintiff's work and that the two works were probatively similar.[318] Both parties tended to use experts to testify as to whether the similarities between the two compositions were indicative of copying—that is, whether from a musicological standpoint, the similarities were unlikely to have occurred by chance or by the defendant's reliance on common public domain source material.[319] If the defense's expert testimony that the works lacked probative similarity was convincing, then presumably the trier of fact would not need to reach the "unlawful appropriation" issue. Without probative similarity, copying could not exist, and thus, the unlawful appropriation issue became moot.[320] In fact, if the disputed works were obviously different in their melody, harmony, rhythm, and form, it would be possible to resolve some cases at the summary judgment stage, avoiding a trial on the merits.[321]

But many courts were reluctant to resolve music infringement disputes at the summary judgment phase. Both parties usually introduced expert testimony that diverged dramatically, depending on

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without any apparent expert testimony that the "theme or melody of the music is substantially the same in the copyrighted and the alleged infringing pieces.").

316. *Boosey*, 224 F. at 647.

317. *Blume*, 30 F. at 631 ("The theme or melody of the music is substantially the same in the copyrighted and the alleged infringing pieces. . . . There are variations, but they are so placed as to indicate that the former was taken deliberately, rather than that the latter was a new piece.").

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

319. *See* Heim v. Universal Pictures Co., 154 F.2d 480, 488 (2d Cir. 1946); Life Music, Inc. v. Wonderland Music Co., 241 F. Supp. 653, 655-56 (S.D.N.Y. 1965).

320. Jones v. Supreme Music Corp., 101 F. Supp. 989, 990 (S.D.N.Y. 1951) ("Of course, if there are no similarities no amount of evidence of access will suffice to prove copying.").

321. *See, e.g.*, Currin v. Arista Records, Inc., 724 F. Supp. 2d 286, 291 (D. Conn. 2010) (granting the defendants' motion for summary judgment and finding that "no reasonable trier of fact could find the works substantially similar").

which party employed the expert.[322] Thus, the requirement for summary judgment that the case present no genuine issue of material fact was infrequently satisfied.[323] In addition, judges had an obvious love-hate relationship with the experts. They recognized the value of the specialized and knowledgeable perspective that experts provided,[324] while at the same time discounting it.[325] The expert opinions tended to cancel each other out, and given most experts' comparable qualifications, it was difficult to weigh one side's expert testimony more heavily than the other's. Some courts also thought that a party could buy any particular music historian's or analyst's "expert" opinion for a price.[326]

Scholarly opinion on the value of experts has also traversed a wide arc. Some scholars have viewed experts as invaluable in identifying the copyrightable components of music compositions by means of analytical dissection.[327] Under this view, experts are essential at both the probative-similarity and substantial-similarity

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322. *E.g.*, Allen v. Walt Disney Prods., 41 F. Supp. 134, 138 (S.D.N.Y. 1941) ("The opinions of these men of music are so widely apart that it is impossible to reconcile them.").

323. *See, e.g.*, Lessem v. Taylor, 766 F. Supp. 2d 504, 512 (S.D.N.Y. 2011) (noting that the differing opinions of the two sides' experts precluded summary judgment).

324. *See* Velez v. Sony Discos, No. 05 Civ. 0615 (PKC), 2007 U.S. Dist. LEXIS 5495, at *18 (S.D.N.Y. Jan. 16, 2007) ("[E]xpert testimony in a music plagiarism case such as this, which does not concern song lyrics but rather the underlying elements of melody, rhythm, harmony, and structure, may be necessary to resolve claims of copyright infringement."); Tisi v. Patrick, 97 F. Supp. 2d 539, 541 (S.D.N.Y. 2000) (crediting the defendant's expert with helping the court to overcome its "unfamiliarity" with the rock music genre).

325. *See, e.g.*, Overman v. Loesser, 205 F.2d 521, 524 (9th Cir. 1953) (affirming the trial court's refusal to allow the plaintiff's expert to testify as to whether two works could have been independently created); Walters v. Shari Music Publ'g Corp., 185 F. Supp. 408, 409-10 (S.D.N.Y. 1960) (minimizing the importance of expert testimony and stating that "the impression of substantial identity made upon the untrained ear is even more convincing"); Supreme Records, Inc. v. Decca Records, Inc., 90 F. Supp. 904, 912 (S.D. Cal. 1950) (declining "to resolve the different interpretations by musically trained listeners," i.e., experts, and instead attempting to approach the issue of similarity by placing "himself," i.e., the judge, in the position of the average lay listener).

326. *See* Baron v. Leo Feist, Inc., 78 F. Supp. 686, 686-87 (S.D.N.Y. 1948) ("[T]he musical experts for each side demonstrated, in their zealous partisanship, the doubtful function of the expert as an aid to the court in this class of litigation.").

327. *See* J. Michael Keyes, *Musical Musings: The Case for Rethinking Music Copyright Protection*, 10 MICH. TELECOMM. & TECH. L. REV. 407, 434 (2004) ("[I]t would be difficult to overstate the importance of experts in music copyright litigation."); Alice J. Kim, *Expert Testimony and Substantial Similarity: Facing the Music in (Music) Copyright Infringement Cases*, 19 COLUM.-VLA J.L. & ARTS 109, 122 (1995) (arguing that expert testimony should be allowed throughout trial in copyright infringement cases involving musical works); Jeffrey Cadwell, Comment, *Expert Testimony, Scènes A Faire, and Tonal Music: A (Not So) New Test for Infringement*, 46 SANTA CLARA L. REV. 137, 168 (2005) ("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.").

stages of the *Arnstein v. Porter* analysis.[328] Because of their musicological training, these experts can identify whether both copying and improper appropriation have occurred far more accurately than a lay judge or jury. Because of their general lack of musical training, judges and juries are likely to be both overinclusive and underinclusive in their assessment of infringement.[329] They may incorrectly find two works to be substantially similar based on the manner in which they are performed and on certain qualities characteristic of a particular genre—for instance, country-western, blues, or hip hop. In fact, the defendant may not have borrowed at all from the plaintiff's work. On the other hand, the manner of performance and the arrangement of material may mask underlying similarities indicative of plagiarism. The two works may not sound very much alike to the trier of fact, even though they are musically very similar.

Other scholars, however, have argued that the lay trier of fact is ideally suited to determine whether copying has occurred.[330] Music analysts and theorists may be trapped by the wealth and subtlety of their own expertise in trying to determine similarities between two works. The ultimate standard under copyright law should be whether the defendant has interfered with the plaintiff's market by copying the plaintiff's work. If copying has occurred to some degree but most lay listeners would not find the two works substantially similar, then presumably the defendant's work is not a substitute for the plaintiff's. In other words, consumers would not purchase the defendant's work in lieu of the plaintiff's. Assuming both works are in the same genre of music, listeners partial to that genre might easily purchase both works. If they buy only one work, their decision might be based not on the nature of the musical composition, but on other factors, such as the celebrity of the artist performing the work, the quality of the performance, or their familiarity with the work from airplay. Thus, because of the market-substitution theory underlying copyright law, these scholars view the judge or jury as especially suited to apply the ordinary lay listener standard in music infringement cases.

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328. *See* Kim, *supra* note 327, at 125 ("[M]usic's complexity demands the assistance of experts throughout the infringement analysis.").

329. *Id.* at 128.

330. *See* Paul M. Grinvalsky, Comment, *Idea-Expression in Musical Analysis and the Role of the Intended Audience in Music Copyright Infringement*, 28 CAL. W. L. REV. 395, 397 (1992) (arguing, however, that juries should be composed of the intended audience for the works); Austin Padgett, Note, *The Rhetoric of Predictability: Reclaiming the Lay Ear in Music Copyright Infringement Litigation*, 7 PIERCE L. REV. 125, 146-49 (2008) ("Courts should continue to employ the Arnstein lay listener inquiry in its purest form.").

IV. MUSIC INFRINGEMENT: A CASE STUDY

As the discussion above suggests, one can approach copyright infringement in music cases, and in particular the issues of probative, substantial, and striking similarity between two works, from both a legal and a musicological point of view. But inevitably, technical musical analysis heavily influences the legal approach, especially when courts and juries must determine whether the defendant copied from the plaintiff's musical composition. This Part examines the question of music infringement within a musicological framework and presents a case study from a recent copyright infringement case in which the court may have gone down the wrong path, either in whole or in part. In general, the apparent errors committed by courts can be attributed to several causes, such as: (1) the lack of familiarity with music theory; (2) the sometimes unhelpful contribution of music experts; (3) the failure to fully appreciate the constraints of Western tonality; and (4) the inherent difficulty of distinguishing between copying from the plaintiff's work and the defendant's general reliance on the extensive public domain Western music repertoire upon which modern Western composers draw.

A recent federal district court decision exemplifies many of the difficulties confronting judges and juries in music infringement cases. In *Straughter v. Raymond*,[331] the plaintiff Straughter alleged that the defendants had infringed the copyright in his song "The Reasons Why" ("Reasons") by creating and recording their song "Burn."[332] The plaintiff composed his song in 1998; the defendants composed theirs in 2003.[333] The defendants moved for summary judgment, arguing, among other things, that the plaintiff's song lacked originality and that the plaintiff had failed to adduce sufficient evidence of access and substantial similarity.

In adjudicating the defendants' motion for summary judgment, the court first disposed of some preliminary issues regarding copyright registration[334] and unclean hands,[335] then it proceeded to decide the

331. Straughter v. Raymond, No. CV 08-2170 CAS (CWx), 2011 U.S. Dist. LEXIS 93068 (C.D. Cal. Aug. 19, 2011).

332. *Id.* at *5-7.

333. *Id.* at *6-7.

334. *Id.* at *9-11. The defendants argued that the copyright registration obtained in the plaintiff's song "Reasons" did not also cover the recorded version of the song entitled "No More Pain" (hereinafter "Pain"). *Id.* at *9. The court found that because both "Reasons" and "Pain" were "identical in all material respects," the copyright registration for "Reasons" applied to "Pain" as well. *Id.* at *10-11.

335. *Id.* at *14-18. The defendants alleged that the plaintiff falsely asserted complete ownership of the copyright to "Reasons," when in fact he owned only a 13 percent share of it. *Id.*

central infringement issues. The court noted that the plaintiff had to prove that he owned a valid copyright and that the defendants had impermissibly copied his work.[336] Because the plaintiff had registered his copyright in "Reasons" before the song's publication, he was entitled to the presumption of the copyright's validity.[337] Attempting to rebut that presumption, the defendants argued that the plaintiff's song was unoriginal and therefore not subject to copyright protection.[338] The court, however, rejected that argument as a matter of law, observing that originality exists even where plaintiffs have based their works on public domain or other earlier materials, so long as the plaintiffs have contributed more than a "merely trivial" variation to the prior works.[339] Relying on Ninth Circuit precedent, the court adopted an extremely low standard for originality,[340] and found little merit in the defense expert's attempt to show that the plaintiff's song was similar in a number of respects to older R&B and other types of songs.[341]

The court in *Straughter* then examined the core elements of the plaintiff's copyright infringement case: access and substantial similarity.[342] Without any direct evidence of copying, the plaintiff had to prove that the defendants had access to the plaintiff's song and that the two works showed substantial similarity.[343] Relying on a chain-of-events theory, the plaintiff attempted to demonstrate that one or more of the defendants had access to his song through generalized contacts between the two sets of parties[344] and through the involvement of a third-party intermediary who had contact with

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at *12. The court concluded that there were genuine issues of material fact as to the plaintiff's ownership interest, thus precluding summary judgment. *Id.* at *15. In addition, even if the plaintiff had misrepresented the extent of his ownership, the defendants suffered no prejudice as a result. Accordingly, the doctrine of unclean hands did not bar the plaintiff's infringement action. *Id.* at *16-17.

336. *Id.* at *18.

337. *See id.* at *19-21 (clarifying prior Ninth Circuit cases and rejecting the defendants' argument that the plaintiff was not entitled to the presumption of validity of his copyright because he filed suit almost ten years after registration).

338. *Id.* at *21-22.

339. *Id.* at *22-24.

340. *See id.* at *22 (explaining that to qualify for copyright protection, an author need only add some nontrivial variation to existing works—"something recognizably 'his own'").

341. *See id.* at *23-24 (discussing the general unhelpfulness of expert testimony).

342. *Id.* at *24.

343. *See id.* at *25 (noting that the plaintiff must show the defendants had a "reasonable possibility" of seeing the plaintiff's work either through a chain of events connecting the plaintiff's work and the defendants' access to it or wide dissemination of the plaintiff's work).

344. *See id.* at *25-26 (describing the plaintiff's unsuccessful attempt to establish access through "a convoluted series of personal contacts and purported collaborations" between the defendant and the band that first recorded the plaintiff's song).

both sides.[345] Although the evidence that the plaintiff adduced was somewhat speculative and tenuous,[346] the court found that the plaintiff had presented enough for his access theory to survive summary judgment.[347] Interestingly, the court, on its own initiative, uncovered evidence of fairly wide dissemination of the plaintiff's song to buttress the chain-of-events theory of access.[348]

In addressing substantial similarity between the plaintiff's and defendants' works, the court in *Straughter* referred to the Ninth Circuit's approach, where the trier of fact performs an objective extrinsic analysis of the two works followed by a subjective intrinsic analysis of them.[349] At the summary judgment stage, the judge does an extrinsic analysis alone to determine whether the case should proceed to trial.[350] Under the extrinsic component of substantial similarity, the court compares the protected elements of the two works.[351] But the court in *Straughter* acknowledged that the Ninth Circuit has never defined a "uniform set of factors for analyzing a musical composition under the extrinsic test."[352] The court observed that a composer can combine a wide variety of elements, unprotectable in isolation, to form a musical composition—elements such as "lyrics, rhythm, pitch, cadence, melody, harmony, tempo, phrasing, structure, chord progression, instrumental figures, and others."[353] Quoting *Swirsky v. Carey*, the leading Ninth Circuit precedent on infringement of musical works, the court described the plaintiff's burden with respect to the extrinsic test: "So long as the plaintiff can demonstrate, through expert testimony that addresses some or all of these elements and supports its employment of them, that the similarity was 'substantial' and to 'protected elements' of the copyrighted work, the extrinsic test is satisfied."[354]

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345. *See id.* at *28-35 (detailing the contacts that the producer of the album that first contained the plaintiff's song had with both the plaintiff and the defendants).

346. *See id.* at *35 (acknowledging that the evidence of access via a third-party intermediary was "weak").

347. *Id.* at *37.

348. *See id.* at *39 (taking judicial notice of evidence that in 1999 the album on which the plaintiff's song was first recorded reached number 197 on the "Billboard 200" chart and number thirty-two on the "Billboard R & B/Hip Hop" chart). At the same time, the court refused to apply the "inverse ratio rule," under which a strong showing of access can counterbalance a weaker showing of substantial similarity. *Id.* at *41-42.

349. *See id.* at *42.

350. *Id.*

351. *Id.*

352. *Id.* at *43.

353. *Id.*

354. *See id.* (quoting Swirsky v. Carey, 376 F.3d 841, 849 (9th Cir. 2004)).

Applying the *Swirsky* test, the court in *Straughter* then found that the plaintiff had presented sufficient evidence, through the testimony of his expert, George Saadi, to survive defendants' summary judgment motion.[355] The court pointed to Saadi's discovery of numerous commonalities between the two songs, such as the use of a lengthy eighteen-bar introduction and a "substantially similar" structure.[356] In rejecting the defendants' argument that Saadi failed to distinguish between ideas and expression in his expert report, the court opined that musicologists are not qualified to identify "ideas" for the purpose of copyright law.[357] In addition, although some of the similar elements that Saadi identified may be unprotectable by themselves, copyright law can protect a combination of uncopyrightable elements.[358] In contrast to the plaintiff's expert's approach, the defendants' expert made a detailed analysis of both compositions using a note-by-note comparison of the two melodies.[359] This analysis, almost mathematical in its precision, provided compelling evidence that although the two works had some structural similarities, their melodies were quite distinct.[360] If melody drives the infringement bus, as it generally has, then it would seem that the defendants did not impermissibly copy the plaintiff's composition.[361]

Ultimately, the court in *Straughter* found that the plaintiff's expert, Saadi, had credibly identified enough similarities between the

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355. *Id.* at *49.

356. *Id.* at *43-49, 54 (referring extensively to the expert's report on the disputed works).

357. *Id.* at *51.

358. *Id.* at *51-52.

359. In his report, the defendants' expert recorded numerous differences between the melodies of the disputed works:

> The specific differences between each motif in *Pain* and each corresponding motif in *Burn* are summarized below.
>
> . . . Motif A/tag – Dr. Keyes [plaintiff's expert] identifies the following pitch sequences as Motif A/tag in *Pain* and *Burn*:
>
> Pain — 1-4-3-1-7-7-2-1
>
> Burn — 1-2-4-3-2-1-4-3-2-1
>
> A pitch sequence of 1-4-3-1-7-7-2-1 plainly is not the same as or similar to a pitch sequence of 1-2-4-3-2-1 or 4-3-2-1. And while both iterations of Motif A/tag in *Burn* contain the 4-3-2-1 sequence—a commonplace, building-block major scale in music—Motif A/tag in *Burn* does not contain that sequence at all. In addition, Motif A/tag in *Burn* has an ornamental quick note (as transcribed by Dr. Keyes, but not reported in her narrative) that is not in Motif A/tag in *Pain*.

See Reply Decl. of Lawrence Ferrara at 2-3, Straughter v. Raymond, No. CV 08-2170 CAS (CWx), 2011 U.S. Dist. LEXIS 93068 (C.D. Cal. Aug. 19, 2011) (No. 242-9).

360. *Id.*

361. Some courts, however, have recognized that harmony may be original: "While we agree that melody generally implies a limited range of chords which can accompany it, a composer may exercise creativity in selecting among these chords." Tempo Music, Inc. v. Famous Music Corp., 838 F. Supp. 162, 168 (S.D.N.Y. 1993).

two works to raise a genuine issue of material fact.[362] The efforts of the defendants' expert to call into question the quality and relevance of Saadi's analysis were unavailing in the context of the summary judgment motion. The court obviously felt most comfortable with leaving the major issues for resolution at trial where experts from both sides could undergo vigorous cross-examination.

The *Straughter* opinion in many ways typifies the challenges that courts face in music infringement cases—however thoughtful, careful, and legally expert those courts may be. The evidence of access in *Straughter* was weak, and the similarities between the two works were born more of an overall structural resemblance, as opposed to actual similarity between the melody, harmony, and rhythm. In analyzing the plaintiff's evidence of access, the court displayed some inconsistency. At one moment, the judge rejected the notion that access existed because the band that recorded the plaintiff's song and the defendant Raymond were close in age and had common backgrounds.[363] But later the court found access plausible on the basis that the plaintiff, the defendants, and the producer of the album on which the plaintiff's song appeared "r[a]n in the same musical circles."[364] If "running in the same musical circles" is sufficient evidence of access, then arguably access would exist in every case in which the plaintiffs and defendants work in the same genre or are in geographic proximity. Access, then, would lose any significance as a separate criterion for copying.

Similarly, the court's evaluation of the experts' reports seems like an almost inevitable, if not meaningless, exercise. The experts, both of whom had more than respectable musical credentials, reached diametrically opposite conclusions, as might be expected.[365] The judge in *Straughter*, like any layperson, had to rely on the superficial logic and credibility of the experts' analyses. Either expert opinion could be "true," but both could not be. Thus, given the possibility that the plaintiff could eventually prevail at trial, the court felt constrained to let the case go forward, to put the plaintiff to his proof, and to allow the jury to decide the infringement question. But it is not at all clear that, even with the benefit of a complete trial, the jury would be any better equipped to evaluate the access evidence and to parse the expert testimony.

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362. *Straughter*, 2011 U.S. Dist. LEXIS 93068, at *54-55.

363. *Id.* at *26-27.

364. *Id.* at *35-36.

365. The plaintiff's expert found that the two works had "both substantial and striking similarities." *Id.* at *46. The plaintiff's expert did not go unchallenged. *See id.* at *50-53.

V. OBSERVATIONS AND A MODEST PROPOSAL

A. The Unique Challenges of Music Infringement Cases

As most students of music infringement have concluded, music is different from other expressive works protected by copyright.[366] How it is different has been difficult to describe.[367] Based on the Authors' study of litigated music infringement cases, including both the disputed musical works and the judicial analysis of the infringement elements, this Article offers several observations as well as a modest proposal for changes in the manner in which courts approach these types of cases.

First, although one can read a musical score, generally music gains its primary value from being performed and heard. As mentioned above, neurological science suggests that music is understood, stored, and recollected in specific areas of the human brain.[368] Additionally, as a result of the idiosyncrasies of the human brain and experience, hearing and listening are not democratic.[369] Potential jurors adjudging substantial similarity in music infringement cases will vary enormously in their ability to discern musical nuances in particular pieces and to determine similarities between them.

Second, contemporary musical works tend to resemble one another, particularly within genres.[370] Many of these similarities can

366. *See, e.g.*, Wihtol v. Wells, 231 F.2d 550, 552 (7th Cir. 1956) ("Of all the arts, music is perhaps the least tangible."); Stephanie J. Jones, *Music Copyright in Theory and Practice: An Improved Approach for Determining Substantial Similarity*, 31 DUQ. L. REV. 277, 278 (1993) ("Music is particularly ill-suited to the analysis designed by [the Ninth Circuit in] *Krofft*; due to music's inherently distinctive features which dictate a different inquiry to determine substantial similarity."); Cadwell, *supra* note 327, at 157 ("[M]usic's unique nature makes it difficult to draw a distinction between idea and expression."); Aaron Keyt, Comment, *An Improved Framework for Music Plagiarism Litigation*, 76 CAL. L. REV. 421, 443 (1988) (observing that it is impossible to apply the standard infringement analysis to musical works: "I do not see how it can be done").

367. *See* Joan Stambaugh, *Expressive Autonomy in Music*, *in* UNDERSTANDING THE MUSICAL EXPERIENCE 167 (F. Joseph Smith ed., 1989) ("Music in particular takes us into an even more rarified sphere, beyond concepts, representation and objectivity. For this reason there may have been more divergence of opinion, confusion and misunderstanding about what music is and is supposed to do than about any of the other arts.").

368. *See* OLIVER SACKS, MUSICOPHILIA: TALES OF MUSIC AND THE BRAIN 117-18 (2008) (discussing areas of the brain involved in music comprehension and enjoyment).

369. *See* AARON COPLAND, WHAT TO LISTEN FOR IN MUSIC 7 (New Am. Library 2009) (1939) ("We all listen to music according to our separate capacities.").

370. *See* Moore v. Columbia Pictures Indus., Inc., 972 F.2d 939, 946 (8th Cir. 1992) (adopting the defendants' experts' views that any similarity between the disputed works was attributable to their common "R & B/hip-hop genre").

be traced to the use of common public domain elements.[371] And, the musical content of many recent popular works is rather simple, stylistically similar, and perhaps even generic.[372] The primary economic value of contemporary music derives from the recording, staging, and promotion of a particular artist's performance.[373] The artist's mystique, charisma, glamour, and vocal ability arguably push music sales more than the originality, sophistication, and depth of the songs sung by that artist.

Third, there is an inherent tension among the doctrines relating to subconscious copying, access, and independent creation. Courts have found subconscious copying in several cases where the plaintiff's work was widely disseminated, but the defendant vigorously denied any conscious recollection of it.[374] On the other hand, even where the disputed works bore a relatively close resemblance to each other, courts denied relief to plaintiffs whose only proof of access rested on some degree of dissemination or on a chain of events beginning with the plaintiff and ending (supposedly) with the defendant.[375]

Defendants in both types of cases—wide dissemination and chain-of-events—often assert independent creation as a defense to infringement. Sometimes, defendants easily establish independent creation because of chronological impossibility—that is, the defendant wrote his composition before the plaintiff wrote hers.[376] In other cases, defendants have tried to show independent creation through a detailed presentation of their creative process—jam sessions, brainstorming with cowriters, plunking out tunes on the piano, and so

371. *See* Granite Music Corp. v. United Artists Corp., 532 F.2d 718, 721 (9th Cir. 1976) (observing that the common elements between the disputed works could be traced to several earlier compositions); McMahon v. Harms, Inc., 42 F. Supp. 779, 780 (S.D.N.Y. 1942) (same).

372. For decades, judges have felt constrained to comment on the rudimentary nature of popular musical works. *See, e.g.*, Darrell v. Joe Morris Music Co., 113 F.2d 80, 80 (2d Cir. 1940) ("[W]hile 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."); Hein v. Harris, 175 F. 875, 876 (C.C.S.D.N.Y. 1910) ("The defendant urges with much truth that both his own and the complainant's songs are in the lowest grades of the musical art.").

373. *See* Ben Ratliff, *Through the Wormhole with Björk*, N.Y. TIMES, Feb. 4, 2012, at C1 (describing an elaborate multimedia concert involving mechanical devices, videos, dancers, and the lead singer, Björk, in "a rust-colored wig and blue plastic dress with nautilus-shaped attachments at the hips and breasts").

374. *See supra* notes 262-64, 279-87 and accompanying text.

375. *See* Selle v. Gibb, 741 F.2d 896, 905-06 (7th Cir. 1984) (affirming the trial court's j.n.o.v. in favor of the defendants where the two songs were extremely similar but access was somewhat weak).

376. *See* Intersong-USA v. CBS, Inc., 757 F. Supp. 274, 282 (S.D.N.Y. 1991) (concluding that the defendants' song was written before the plaintiff's).

forth.[377] Some courts have been more convinced than others of the true independence of the defendant's creative effort. The similarity between the two works and the credibility of the defendant's evidence carry significant weight in the final determination.

One of the familiar saws attached to independent creation is the notion that if someone autonomously wrote a poem identical to Keats's *Ode on a Grecian Urn*, the second poem would be considered original and thus copyrightable.[378] Of course, the chance of such an occurrence is extremely low. In the musical realm, on the other hand, such an independent duplication may be much more probable. The restrictions of Western tonal music, the relative simplicity of contemporary popular works, the commonality within genres, the rich shared musical heritage of most Western composers, and the vast and pervasive daily exposure to music experienced, especially by music professionals, can result, not surprisingly, in the creation of two similar works by two different composers at two different times.[379]

Independent creation is intimately tied to originality, which is at the core of copyright protection. Originality is both statutorily and constitutionally required as a predicate for copyright.[380] Under the famous Supreme Court formulation in *Feist Publications, Inc. v. Rural Telephone Service Co.*, originality consists of independently created expression that entails a minimal level of creativity.[381] Given the factors discussed above that restrict compositional choices, and the conceivable exhaustion of the most pleasing melodic combinations, one may justly ask, "Is there anything new under the sun?" In other words, is the contemporary popular composer doing anything more

377. *See, e.g.*, Benson v. Coca-Cola Co., 795 F.2d 973, 975 (11th Cir. 1986) (describing the defendants' compositional process).

378. Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936) ("[B]ut if by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's.").

379. The great copyright scholar Benjamin Kaplan observed that the "musical tradition tolerates considerable definite and deliberate borrowing provided the later composer manipulates what he has taken" and that "the law can afford to take a permissive attitude toward cross-lifting among serious musical works." KAPLAN, *supra* note 2, at 53.

380. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 355 (1991) (referencing the 1976 Copyright Act's extension of copyright to only "original works of authorship"). *Feist* further notes that the IP Clause of the US Constitution refers to "Writings" and "Authors," both of which connote originality. *See id.* at 346.

381. *See id.* at 345 ("Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.").

than recycling timeworn musical motifs from the near and distant past?[382]

Fourth, any set of legal rules intended to determine infringement in music cases must account for the interests of both plaintiffs and defendants. Many plaintiffs in these cases are composers who are struggling to advance their careers by securing the interest of successful artists who might want to perform and promote their work.[383] Other plaintiffs have enjoyed a moderate level of success as composers of music that has been produced and performed on a modest scale.[384] The defendants, on the other hand, are invariably highly successful music producers, composers, or performers.[385] The plaintiffs are convinced that more powerful figures in the music industry have stolen and exploited their work.[386] The defendants believe that the plaintiffs are trying to piggyback on the defendants' fame and economic success by alleging plagiarism.

From their respective positions, each party suffers considerable frustrations. Plaintiffs who submitted songs to major record labels face the obstacle of trying to prove that their work found its way into the hands (and ears) of the defendants. Defendants can always obscure the path that the plaintiff's work took to reach them and make it virtually impossible for the plaintiff to prove access.[387] Defendants, on the other hand, experience the constant irritation, not to mention the cost, of defending against infringement suits by unknown composers claiming a piece of the defendants' hard-won success. This David-and-Goliath paradigm, of course, is present in

382. *See* Wendy J. Gordon, *Render Copyright unto Caesar: On Taking Incentives Seriously*, 71 U. CHI. L. REV. 75, 78 (2004) ("All artists create using much they have not themselves created, both in terms of physical and human surroundings and in terms of cultural heritage. The holders of a common cultural tradition resemble the inhabitants of Locke's state of nature: their riches are largely not of their own making.").

383. E. Scott Fruehwald, *Copyright Infringement of Musical Compositions: A Systematic Approach*, 26 AKRON L. REV. 15, 16 (1992) ("The typical situation occurs when the composer of an unknown work files suit claiming that a popular, financially successful piece has been copied from his work.").

384. *See, e.g.*, Palmieri v. Defaria, 88 F.3d 136, 137 (2d Cir. 1996) (describing the plaintiff's achievements as a composer of Latin music).

385. *See, e.g.*, Jones v. Blige, 558 F.3d 485 (6th Cir. 2009) (defendant Mary J. Blige); Repp v. Webber, 132 F.3d 882 (2d Cir. 1997) (defendant Andrew Lloyd Webber); *Palmieri*, 88 F.3d at 136 (defendant Gloria Estefan); Smith v. Jackson, 84 F.3d 1213 (9th Cir. 1996) (defendant Michael Jackson).

386. *See, e.g.*, Arnstein v. Porter, 154 F.2d 464, 464 (2d Cir. 1946) ("Plaintiff said that defendant 'had stooges right along to follow me, watch me, and live in the same apartment with me,' and that plaintiff's room had been ransacked on several occasions.").

387. *See, e.g.*, Cartier v. Jackson, 59 F.3d 1046, 1048 (10th Cir. 1995) (observing that the record companies to which the plaintiff had allegedly submitted her demo tape refused to speak with her).

other aspects of the entertainment and advertising industries—for instance, the struggling writer who submits a treatment or screenplay to a movie studio; a photographer who does a proposal for an advertising campaign; or a makeup designer who creates initial sketches for a theatre company.[388] But, in those instances, it is often easier to distinguish ideas from expression and to determine substantial similarity because of the larger range of choices available to an artist working in a literary or visual art medium.

Fifth, the whole question of access by the defendant to the plaintiff's composition has become more complicated with the advent of the Internet. In the past, struggling songwriters would attempt to submit a tape or CD to a record company in the hopes that it might be published or performed.[389] If the defendant later produced a similar song, the plaintiff was often stymied by the difficulties of showing that his or her composition reached the defendant's eyes or ears.[390] Today many aspiring songwriters post their work online and make it freely available.[391] In this setting, plaintiffs could readily argue that the defendants could have accessed their work at any time without any knowledge by the plaintiffs. In other words, wide dissemination, one of the traditional methods of proving access, becomes almost inevitable as more and more prospective plaintiffs establish websites and encourage the public to listen to their music compositions online.

Sixth, experts occupy an essential role in music infringement cases because of the general inaccessibility of music structure and theory to the average lay person. Even without the assistance of expert testimony, most ordinary individuals have a healthy capacity to discern whether two photographs, paintings, plays, and novels are similar, to the extent that the later work is likely to have been copied

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388. *See, e.g.*, Mannion v. Coors Brewing Co., 377 F. Supp. 2d 444, 447-48 (S.D.N.Y. 2005) (involving a plaintiff photographer who had provided a sample photograph to an advertising agency that then apparently used a very similar photograph in its advertising campaign without the plaintiff's permission); Carell v. Shubert Org., Inc., 104 F. Supp. 2d 236, 241-43 (S.D.N.Y. 2000) (involving a plaintiff who created some of the makeup designs for the original New York production of the musical *Cats* and alleged that the defendants exploited those designs without her permission); Anderson v. Stallone, No. 87-0592 WDK (Gx), 1989 U.S. Dist. LEXIS 11109, at *2-4 (C.D. Cal. Apr. 25, 1989) (involving a plaintiff who alleged that his treatment for a *Rocky* movie was used without permission when the defendants wrote the screenplay for *Rocky IV*).

389. *See, e.g.*, Tisi v. Patrick, 97 F. Supp. 2d 539, 541 (S.D.N.Y. 2000) (describing the plaintiff's submission of a "Demo Tape" to various music producers).

390. *See, e.g.*, McRae v. Smith, 968 F. Supp. 559, 563-64 (D. Colo. 1997) (noting that virtually none of the individuals to whom the plaintiff had allegedly submitted her demo tape could recall having received or heard the tape).

391. *See* Damian Kulash, Jr., *The New Rock-Star Paradigm*, WALL ST. J., Dec. 17, 2010, at D1 (detailing how musicians have used various business models to generate revenue).

from the earlier work (assuming that the plaintiff has demonstrated evidence of access). In other words, regardless of what various hired experts may say, the average person knows what he or she sees and reads. But in music cases, does the jury really know what it is hearing?[392] Works that are musically unalike can sound similar, and works that are musically alike can sound different, depending on the performer's presentation and the listener's musical sophistication. As a result, the musical expert's views carry special weight—the expert tells the lay listeners what exactly they are hearing.

At the same time, however, the various experts may tend to cancel one another out. At the summary judgment stage, the trial court is faced with affidavits and reports from both parties' experts. Both sets of experts are usually well-qualified musicologists or music theorists, who have often provided expert testimony in similar cases in the past. Without some glaring shortfall in the analysis tendered by one side's expert, the judge must usually deny summary judgment and leave the ultimate issues of probative and substantial similarity for resolution at trial. At trial, the jury (or judge in a bench trial) will come up against the same difficulty experienced at the summary judgment stage—two sets of experts testifying for the plaintiff and the defendant, each with a credible interpretation of the musicological similarity or dissimilarity of the disputed works.[393]

Seventh, the compulsory or mechanical license for musical works provided for in § 115 of the Copyright Act reflects a congressional judgment that such works should be available for second comers to use in creating their own interpretations.[394] Although

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392. Shortly after *Arnstein v. Porter* was decided, one judge was almost apoplectic at that case's insistence on the reasonable-lay-listener standard for infringement:

> [T]he issue is no longer one of musical similarity or identity to justify the conclusion of copying—a[n] issue to be decided with all the intelligence, musical as well as legal we can bring to bear upon it—but is one, first, of copying, to be decided more or less intelligently, and, second, of illicit copying, to be decided blindly on a mere cacophony of sounds.

Heim v. Universal Pictures Co., 154 F.2d 480, 491 (2d Cir. 1946) (Clark, J., concurring).

393. *See, e.g.*, Allen v. Walt Disney Prods., 41 F. Supp. 134, 140 (S.D.N.Y. 1941) (expressing extreme frustration at the irreconcilable views of the two parties' experts and stating "I cannot differentiate between the two sets of experts; neither can I say that complainant's experts are correct and the respondents' incorrect").

394. Copyright Act of 1976, 17 U.S.C. § 115 (2006); *see* Paul S. Rosenlund, *Compulsory Licensing of Musical Compositions for Phonorecords Under the Copyright Act of 1976*, 30 HASTINGS L.J. 683, 686 (1979) ("The feelings in Congress at the time were that the American public should continue to have access to the popular music of the day, but that the growing economic importance of mechanically reproduced music made it necessary to guarantee composers adequate compensation for their work." (citing H.R. REP. NO. 60-2222, at 7 (1909)). The compulsory license allows a later performer to make "a musical arrangement of the [licensed] work to the extent necessary to conform it to the style or manner of interpretation of

originally introduced into the Copyright Act of 1909 to break the anticipated iron grip of a few powerful recording companies, the mechanical license perhaps has persisted in the law in oblique recognition of the desirability of the widest possible dissemination of music. Of course, second users are required to pay the statutory royalty to do their own rendition of the copyrighted work, but the goal of widespread availability of music is still at the heart of the mechanical license.

Finally, from a musicological point of view, given the finite range of choices offered by Western tonality, with its established or commonly shared harmonic, melodic, rhythmic, and formal practices, it is virtually inevitable that certain compositions may resemble each other closely without plagiarism.[395] Examples abound from both traditional classical works and contemporary popular works, yet arguably none are plagiarized; rather, they are prominent incorporations of an otherwise conventional tonal or formal type.

B. Musical Antecedents of Contemporary Popular Music

In determining whether a contemporary work is original or in fact based on a public domain antecedent, one must inevitably reference those works and practices whose scale, scope, and achievement defined the limits and possibilities of tonal music. A short list of composers who ultimately realized such possibilities includes, chronologically: Monteverdi (d. 1643), Bach, Haydn, Mozart, Beethoven, Schubert, Chopin, Wagner, Verdi, Brahms, Mahler, Debussy, Bartok, and Stravinsky (d. 1971). These works and practices exhausted virtually all tonal, formal, rhythmic, metric, contrapuntal, compositional, and theoretical possibilities within the realm of tonality. As one might cite legal precedents as examples to defend or prove a legal point, so must a music analyst follow a similar method in analyzing scores to determine plagiarism.

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the performance involved." 17 U.S.C. § 115(a)(2). At the same time, the later performer "shall not change the basic melody or fundamental character of the work." *Id.*

395. The exact rhythm or intervallic melodic shape (for instance, melody including pickup note(s))—given varying or modified tempi, meter, rhythmic values, etc.—of a rising perfect fourth, followed by a rising major second and another rising second, found in, for example, Irving Berlin's "How Dry I Am" (a/k/a "The Near Future") may also be found in the initial phrase of the following (exactly, in adjustment of major to minor, or vice versa): Bach's *Invention in A Minor*; the first theme of the second movement of Beethoven's *Second Symphony*; the first theme in the last movement of Beethoven's *Pathétique Piano Sonata in C Minor*; "Doctor Gradus ad Parnassum" of Debussy's *Children's Corner Suite*; the Transfiguration Theme of Richard Strauss's tone poem, "Death and Transfiguration"; and Cole Porter's song "Don't Fence Me In." Distinctive as these works are, the "How Dry I Am" memory identity is never lost.

By extension, late nineteenth- and twentieth-century European composers of operetta, such as Lehar,[396] Friml,[397] Herbert,[398] Romberg,[399] and Sullivan[400] set the standard for lighter fare, which heavily influenced such US masters of song in musical theatre as Kern,[401] Gershwin,[402] Berlin,[403] Porter,[404] Rodgers,[405] Bernstein,[406] Lerner,[407] Sondheim,[408] Herman,[409] and Kander.[410] These composers, along with parallel developments in jazz, are the closest purveyors of and greatest influence on popular music, including rock, known today. Equally important, African-American music from c. 1900, including the blues, work songs, shouts, chants, gospel, and ragtime, provided the foundation for rap, hip-hop, and the like.[411]

Courts and juries can compare, detect, or recognize potential compositional infringement from one work to another by consulting, comparing, and analyzing the vast lexicon of extant works and practices as referred to in this Article and beyond. The following is a short survey of such points of reference as they apply to the potential practice of plagiarism in virtually any Western tonal style or form.

A common musical language implies a common vocabulary, allowing for regional accents and idioms of time and place. For example, Bach's chromaticism is more clearly rooted in tonal conventions than is Wagner's pervasive chromaticism (as found in *Tristan und Isolde*). Yet, both reveal a common adherence to tonal (for instance, tertian) harmony. In other words, a closer inspection

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396. *See, e.g.*, FRANZ LEHAR, THE MERRY WIDOW (Deutsche Grammophon 1995).

397. *See, e.g.*, RUDOLF FRIML, *Rose Marie*, *on* FRIML: THE VAGABOND KING (EMI Records Ltd. 2005).

398. *See, e.g.*, VICTOR HERBERT, *Naughty Marietta*, *on* HERBERT: NAUGHTY MARIETTA/BYESS, OHIO LIGHT OPERA (Albany Records 2001).

399. *See, e.g.*, SIGMUND ROMBERG, *The Desert Song*, *on* AN EVENING WITH SIGMUND ROMBERG (EMI Angel/Capitol 1990).

400. *See, e.g.*, SIR ARTHUR SULLIVAN, THE MIKADO (Telarc Records 1992).

401. *See, e.g.*, JEROME KERN, *Show Boat*, *on* KERN & HAMMERSTEIN II (EMI Classics 2006).

402. *See, e.g.*, GEORGE GERSHWIN, *Porgy and Bess*, *on* GERSHWIN: PORGY AND BESS (Decca Records 2007) (an opera/operetta/musical hybrid).

403. *See, e.g.*, IRVING BERLIN, ANNIE GET YOUR GUN (Decca Records 2000).

404. *See, e.g.*, COLE PORTER, KISS ME, KATE (Sony Records 1998).

405. *See, e.g.*, RICHARD RODGERS, OKLAHOMA! (MCA Records 1993).

406. *See, e.g.*, LEONARD BERNSTEIN, WEST SIDE STORY (Sony Records 2004).

407. *See, e.g.*, ALAN JAY LERNER, MY FAIR LADY (Legacy/Sony Classical 2011).

408. *See, e.g.*, STEPHEN SONDHEIM, SWEENEY TODD, THE DEMON BARBER OF FLEET STREET (RCA RECORDS 2007).

409. *See, e.g.*, JERRY HERMAN, HELLO, DOLLY! (Sony Classics 2009).

410. *See, e.g.*, JOHN KANDER, CABARET (Sony Classics 2009).

411. Some contemporary popular songs are so musically basic that they are all but impossible to plagiarize.

reveals that Bach and Wagner are drinking from the same well of tonality.

There are a number of common conventions of melodic, harmonic, rhythmic, and formal practices in Western music. The standard examples include: melodic shapes based on scalar movement, broken chords, sequences of two or three phrases or partial phrases, repetition, ABA or AB structure (the most popular song standards), climactic high point (the highest note of the piece, or, less often, the lowest note), and resolution.[412] Because tonal foundations are limited to eight primary tones and five secondary (chromatic) ones, melodies may easily resemble each other up to a point.[413]

A typical melody of Bach is conceived motifically to better accommodate his predominant complex contrapuntal textures.[414] Haydn, Mozart, early Beethoven, and other Classicists typically wrote very symmetric phrases of two- or four-bar lengths.[415] Haydn, however, often upset this symmetry by adding an extra bar or two, thus creating phrases of irregular length.[416] Mature Beethoven wrote brief, motific melodies suitable for development.[417] But he also wrote hymn-like themes featuring simple rhythmic and intervallic shapes.[418] Late Beethoven (1816–1827) wrote broad, sweeping, romantic themes replete with chromatic intervals, pauses, and even changes of tempo as a means of enhancing melodic expression.[419]

Schubert's melodies are influenced by folk song and dance. His *lieder* are typically written in syllabic, that is, nonoperatic style.[420] Their simple rhythms, usually symmetric phrases, and chromatic or diatonic style perfectly suit their settings whether in song, symphony, or chamber music.[421] Bellini greatly influenced the song-like style of

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412. *See* COPLAND, *supra* note 369, at 100-05.

413. *See supra* notes 87-94 and accompanying text.

414. *See* JOHANN SEBASTIAN BACH, *Mass in B Minor*, First Mvt. (1749); JOHANN SEBASTIAN BACH, *Double Violin Concerto*, First Mvt., First theme (1731); JOHANN SEBASTIAN BACH, *The Passion According to St. Matthew*, Penultimate Mvt., First theme (1727); JOHANN SEBASTIAN BACH, *Brandenburg Concerto No. 2*, First Mvt., First theme (1721).

415. *See* LUDWIG VAN BEETHOVEN, *Symphony No. 2*, Second Mvt., First theme (1802); JOSEPH HAYDN, *Symphony No. 104*, First Mvt. (1795); WOLFGANG AMADEUS MOZART, *Symphony No. 40*, First Mvt., First theme (1788)

416. *See* JOSEPH HAYDN, *Symphony No. 104*, Minuet (1795).

417. *See* LUDWIG VAN BEETHOVEN, *Symphony No. 3*, First Mvt., First theme (1804).

418. *See* LUDWIG VAN BEETHOVEN, *Violin Concerto*, Second Mvt., First theme (1806).

419. *See* LUDWIG VAN BEETHOVEN, *String Quartet No. 15, Op. 132*, Fifth Mvt., First theme (1825).

420. *See* FRANZ SCHUBERT, *String Quartet No. 15*, First Mvt., First theme (1826); FRANZ SCHUBERT, *Ave Maria* (1825); FRANZ SCHUBERT, *Symphony No. 8*, First Mvt., Second theme (1821).

421. *See supra* note 420.

Chopin in its long, elegant, broadly arched shape, typically supported by expressive, chromatic harmony.[422] There is a close connection between Chopin's *Fantaisie-Impromptu* and its secondary theme, which became the popular song "I'm Always Chasing Rainbows."[423] Such examples abound. Wagner's themes synthesize motific structure with aria-like melodies whose shape expands through the use of melodic sixths and sevenths.[424] The late nineteenth-century island of Classical-Romantic style that Brahms inhabited features a motif-based German songlike style of thirds or sixths, at times outlining an octave.[425] Brahms's themes may function as broadly sweeping, expressive melody, or, upon closer analysis, tight contrapuntal forms, as in the simultaneous first theme (and its accompaniment as canonic imitation of itself) of the first movement of his *Fourth Symphony*.[426] Mahler's themes further expanded melodic shape through the interpolation of thirds above the basic four-note chordal structure through intervals of ninths, elevenths, and thirteenths, thus incorporating the entire diatonic scale.[427] These harmonies, thus expanded, contribute immeasurably to the enrichment of expressiveness. To these elements, Mahler, like Wagner and Liszt, added chromatic interpolations of passing tones, appoggiaturas, suspensions, and other nonharmonic tones, all supported by corresponding harmonies.[428] This angular, melodic style produced in Richard Strauss's Wagner-idolizing tone poem *Ein Heldenleben* is a primary theme encompassing more than two-and-a-half octaves.[429]

Mature Debussy wrote nonsymmetric or extremely symmetric melodies heavily spiced by the incorporation of whole-tone intervals and harmonies, modal themes (especially the Dorian mode), Pentatonic structures, or a combination of all three.[430] His themes

422. *See* REY M. LONGYEAR, NINETEENTH-CENTURY ROMANTICISM IN MUSIC 80 (1969).

423. *See* PYOTR ILYICH TCHAIKOVSKY, *Piano Concerto No. 1* (1874) (first theme became "Tonight We Love"); WILHELM RICHARD WAGNER, *Lohengrin* (1850) (*Bridal Chorus* became "Here Comes the Bride").

424. *See* WILHELM RICHARD WAGNER, *Götterdämmerung*, Immolation Scene (1872); WILHELM RICHARD WAGNER, TRISTAN UND ISOLDE, *Prelude to Act One*, First theme (1859).

425. *See* JOHANNES BRAHMS, *Minnelied, Symphony No. 1*, First Mvt., First theme (1876).

426. *See* JOHANNES BRAHMS, *Symphony No. 4*, First Mvt. (1885).

427. *See* GUSTAV MAHLER, *Symphony No. 10*, First Mvt., First theme (1910); GUSTAV MAHLER, *Das Lied Von der Erde*, First Mvt. First theme (1909); GUSTAV MAHLER, *Symphony No. 6*, First Mvt., Second theme (1904).

428. *See supra* note 427.

429. *See* RICHARD STRAUSS, *Der Rosenkavalier*, Act Three (1911); RICHARD STRAUSS, *Ein Heldenleben*, First theme (1898); RICHARD STRAUSS, *Till Eulenspiegel*, First theme (1895).

430. *See* CLAUDE DEBUSSY, *Song for Voice and Piano*, Clair de Lune (1890).

tend to be short, non-songlike, elaborately evolved, quasi-arabesque structures in nondevelopmental mosaic-like texture.[431] Bartok, heavily influenced by Debussy (as many of his contemporaries were),[432] wrote similar modal and tonal thematic constructs to which he added the rich, intervallic, rhythmic, and metric store of international folk music and dance, particularly that of his native Hungary.[433]

The great Igor Stravinsky passed through Russian Romantic thematic and harmonic style and Debussyan Impressionism to what might be called Russian Expressionism or Barbarism as found in his revolutionary ballet score, *Le Sacre du Printemps* (1913).[434] The ballet score's melodic structure incorporates a vast array of very short, narrow-ranged, fragmented, and non-songlike melodies.[435] The primary importance of this revolutionary work rests in its asymmetric use of constantly changing meters and accents, often in conjunction with rhythmic ostinati.[436] This work may also include or form part of what is described as static harmony and melody.[437] The closest contemporary cousin of this fragmented melodic shape may be found in pop music that repeats a simple melodic fragment throughout a piece.[438] Instead of Stravinsky's complex shifting metric figuration, one may find a Latin-American accompaniment, a riff, a rock ostinato, or the like.

This short review of the contours of Western musical expression reveals that contemporary composers are inevitably influenced, consciously or subconsciously, by traditions and practices of generations of composers that preceded them. For centuries, composers have been inspired by and have borrowed from their forebears without self-consciousness or shame. Although the practice of borrowing developed at a time when public bodies or private patrons supported musicians, the notion of a shared cultural heritage,

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431. *See* CLAUDE DEBUSSY, *La Mer*, Last Mvt. (1905); CLAUDE DEBUSSY, *Prelude to the Afternoon of a Faun*, First theme (1894); CLAUDE DEBUSSY, *Five Poems of Baudelaire* (1890).

432. GROUT & PALISCA, *supra* note 257, at 667.

433. *See* BÉLA BARTÓK, *Violin Concerto*, First Mvt., First theme (1938); BÉLA BARTÓK, *Music for Strings, Percussion and Celesta*, First Mvt. (1936); BÉLA BARTÓK, *The Miraculous Mandarin*, Final Dance (1924).

434. *See* IGOR STRAVINSKY, *Le Sacre du Printemps* (1913).

435. GRIFFITHS, *supra* note 42, at 239.

436. *Id.*

437. *See* IGOR STRAVINSKY, *Symphony in Three Mvts.*, First Mvt., First theme (1945); IGOR STRAVINSKY, *Symphony of Psalms*, Third Mvt., Final theme (1930); IGOR STRAVINSKY, *Le Sacre du Printemps*, The Adoration of the Earth, The Sacrifice (1913).

438. *See, e.g.*, RICHIE VALENS, *La Bamba* (Del Fi 1958).

to which we are all heirs, arguably has as much relevance today as it did during the time of Bach and Beethoven.

C. A New Methodology for Establishing Music Infringement

The current approach for establishing music infringement used by the courts produces unfair results and consumes unnecessary resources. A revamped approach that recognizes the limitations of Western tonal music, expert testimony, and lay juries conceivably would increase the accuracy of litigation outcomes and reduce litigation costs. To these ends, this Article suggests four modifications to the present method for determining copyright infringement in cases involving popular musical compositions.

First, courts should increase the standard for infringement in music cases to "striking similarity." In other words, courts should require plaintiffs to prove that the two works in question are so similar to each other that only copying can explain the resemblance. The heightened standard would recognize the inevitable similarities between two musical compositions in the same genre. It would also acknowledge the limitations of Western tonal music and the wealth of public domain music that constitutes the field from which all modern composers harvest. This more stringent standard would also discourage plaintiffs with weaker cases who are hoping to spur financially successful defendants to settle, rather than incur the costs of litigation. Finally, such a standard would allow more cases to be resolved at the summary judgment stage, thus limiting litigation costs.

Second, a court should presume a defendant's access to the plaintiff's composition where the latter is reasonably available on the Internet. As mentioned earlier, most up-and-coming songwriters create their own websites or at least seek out websites where they can post their compositions.[439] With such ready-yet-anonymous access, it is quite possible that defendants or someone affiliated with them heard a given plaintiff's music. But access to the Internet, while widely available, is usually anonymous, and it may be even more difficult than in the usual chain-of-events situation for plaintiffs to prove that defendants had more than a theoretical possibility of being exposed to the plaintiffs' compositions. Thus, if plaintiffs have an established online presence, there should be a rebuttable presumption of access. Defendants could then rebut that presumption by showing the improbability of access.

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439. *See supra* note 391 and accompanying text.

Third, at the summary judgment stage and beyond, courts should give particular weight to musical experts' analyses that perform a pitch-by-pitch comparison of the disputed works. Just as words are the basic components of novels and lines of computer code are the fundamental elements of software programs, pitches are the building blocks of musical works. One can construct the same setting (e.g., a quiet English village in the nineteenth century) in two different novels using entirely different words, and no infringement would result.[440] Similarly, one can write two software programs that perform the same function (for instance, word processing) employing different sequences of computer code usually without fear of plagiarism.[441] Therefore, in comparing two musical works, experts should focus on the identity (or lack thereof) between the pitches of each composition. Arguably, the best and most reliable method of proving plagiarism, particularly to the layman, is to transfer the pitch sequence from the musical staff to a numerical representation of the score.[442] For example, one can actually see the exact sequence of pitches as numerical intervals that indicate the precise relationship of one pitch or pitches to another, both in melody (including rhythm) and in harmony. Even here, the proportion of similar or dissimilar passages is crucial. One or more passages may in fact be identical in both pieces. But if those passages are made up of commonplace or conventional tonal musical rhetoric and thus common to virtually all tonal music, plagiarism is not at work.[443]

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440. Under the *scènes-à-faire* doctrine, an author is allowed to employ stock characters, themes, and scenic elements to portray a particular time and place. *E.g.*, Benay v. Warner Bros. Entm't, Inc., 607 F.3d 620, 624-25 (9th Cir. 2010); Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 979 (2d Cir. 1980).

441. *See* Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1253 (3d Cir. 1983) (suggesting that if the idea for a specific computer program can be expressed in a number of ways, then a second programmer would not infringe an earlier programmer's work by trying to express the same idea without mimicking the earlier programmer's source code); E.F. Johnson Co. v. Uniden Corp. of Am., 623 F. Supp. 1485, 1502 n.17 (D. Minn. 1985) ("Had [the defendant] contented itself with surveying the general outline of the [plaintiff's] program, thereafter converting the scheme into detailed code through its own imagination, creativity, and independent thought, a claim of infringement would not have arisen.").

442. *See, e.g.*, Reply Decl. of Lawrence Ferrara, Straughter v. Raymond, No. CV 08-2170 CAS (CWx), 2011 U.S. Dist. LEXIS 93068 (C.D. Cal. Aug. 19, 2011) (No. 242-9).

443. Compare PYOTR ILYICH TCHAIKOVSKY, *Nutcracker Ballet*, Act ii (G major), Grande Pas de Deux (1892), with GEORGE FRIDERIC HANDEL, *Joy to the World* (1721). Both are made up of descending major scales encompassing an octave but with different rhythms. Compare GEORGE & IRA GERSHWIN, *Bess, You Is My Woman Now*, on PORGY & BESS (Decca Records 2006) (first four pitches), with SAMMY FAIN, *April Love* (1957). Their intervallic structure is identical, an ascending major third followed by a descending major sixth, followed by an ascending major second. If the works ended there, one might claim plagiarism. But after their initial utterance, the works diverge—go their own way, so to speak. Hence, no plagiarism.

If Composer A created a country-western ballad about a woman whose husband left her, using one sequence of pitches, and Composer B wrote a similar song with the same theme using a different pitch sequence, then a court should not find infringement, despite the overall similarity of the listening experience. If the plaintiff cannot demonstrate a striking similarity in the selection and arrangement of pitches, then summary judgment for the defendant is warranted.

Fourth, if the plaintiff can survive summary judgment by proving sufficient similarity at the pitch level, then at trial, the reactions of ordinary lay listeners should continue to determine whether there is a striking similarity between disputed works. But in assessing those reactions, courts should encourage the parties to submit in evidence the results of surveys of such listeners, similar to the surveys used to prove actual confusion in trademark infringement cases.[444] As discussed previously, experts and juries tend to have certain weaknesses in determining similarity between two works of music. Parties hire experts to produce opinions with a particular end in mind.[445] Juries, usually containing only six members in federal civil cases, may have idiosyncratic listening abilities even if the voir dire process has successfully weeded out individuals who are "tone deaf."[446] They may not reflect a true cross-section of the population that might be the audience for a particular kind of music. Focus groups or consumer surveys, especially when targeted towards the likely audience for the parties' musical genre,[447] may more accurately reflect whether the two disputed works are similar to the ears of the average lay listener.[448] Ultimately, the plaintiff is most concerned

444. *See, e.g.*, Ga.-Pac. Consumer Prods. LP v. Myers Supply, Inc., 621 F.3d 771, 776 (8th Cir. 2010) (discussing the use of consumer surveys as a means of demonstrating actual confusion in trademark infringement cases); H-D Mich., Inc. v. Top Quality Serv. Inc., 496 F.3d 755, 762 (7th Cir. 2007) (same); Scott Fetzer Co. v. House of Vacuums Inc., 381 F.3d 477, 487-88 (5th Cir. 2004) (same).

445. *See* George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 4 (2000) ("The bias and distortions of truth-finding created by party retention and compensation of expert witnesses have been a subject of perpetual criticism and reform proposals since the nineteenth century.").

446. *See In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1300 (7th Cir. 1995) ("[T]he standard federal civil jury nowadays consists of six regular jurors and two alternates.").

447. *See* Citizens Fin. Grp., Inc. v. Citizens Nat'l Bank, 383 F.3d 110, 118-19 (3d Cir. 2004) (noting the importance in trademark infringement litigation of conducting surveys among those in the appropriate "universe" of consumers).

448. In presenting the two works to a focus group, both parties should be careful to play the works without performance embellishments so that the listeners can hear them in unadorned form and thus concentrate on their compositional similarities. *See* Pam Belluck, *To Tug Hearts, Music First Must Tickle the Neurons*, N.Y. TIMES, Apr. 18, 2011, at D1 (describing a method of playing works on the piano to obtain "the 100 percent musical rendition" without performance variations).

about market displacement. If the plaintiff's and defendant's works strike the parties' expected audience as dissimilar, those audience members might be expected to buy both works—one is not a substitute for the other.

The incorporation of focus group or survey evidence into the litigation process would undoubtedly increase costs. But the initial results of consumer surveys might induce one side or the other to settle. If a fair sample of individuals, for example, overwhelmingly found no similarity between the two works, plaintiffs might decide to drop their suits or to quickly settle for a modest sum.[449] This decision might even occur where the plaintiff has located a musicologist who is willing to testify about the technical similarities between the plaintiff's and defendant's compositions. Thus, overall litigation costs might be reduced as plaintiffs and defendants more accurately assess the merits of their respective positions before a trial begins.

VI. CONCLUSION

We began our journey through Western music in this Article with a community-based system in which composers created works for public use and were subsidized by powerful and influential segments of the community—that is, the Church, the royal court, and noble patrons. When those traditional systems of support disappeared, the need for copyright law became more urgent. At the same time, the Romantic notion of the author as an individual creator with a unique perspective gained popularity. Copyright law emerged as a mechanism by which composers and other authors realize monetary gain from their works and achieve a measure of control over their exploitation. Although the ultimate goal of US copyright law has always been the betterment of society as a whole, the means by which policymakers have achieved that goal has been through incentives to individual authors.

Today we have come almost full circle as society has begun to regard music as a type of common property that should be available to all at little or no cost. With the advent of the Internet and digital media, music can be easily and perfectly distributed throughout the world. The public now apparently views music as part of our common cultural heritage that we should enjoy and build upon with virtually no barriers. Consumer sentiment seems to be on the side of weak copyright protection for both musical works and sound recordings based on those works.

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449. *See supra* Part IV (discussing *Straughter v. Raymond*).

The question remains as to whether this shift in cultural perceptions of music should affect the legal standards for establishing copyright infringement in music cases. Arguably it should and does—the jurisprudence of copyright may stand as the last guardian against an unfettered free-for-all in which individuals may borrow music without attribution, licensing, or remuneration. Without some chance of compensation, professional composers may not be inclined to continue to produce new works.

On the other hand, for the reasons advanced in this Article, courts should refine the standard for infringement and the mechanism by which plaintiffs prove infringement to account for the unique attributes of music as creative expression. This Article argues that "striking similarity" between works should be the standard for infringement in music cases. In addition, access should be presumed where the plaintiff's work has been reasonably made available on the Internet. Courts should encourage both parties, moreover, to supply expert testimony based on a detailed analysis and comparison of the selection and arrangement of pitches comprising each work. Finally, courts should instruct the parties to provide evidence from appropriately constructed focus groups or consumer surveys so as to better determine where the disputed works are strikingly similar to the average lay listener. These changes will make more accurate and less costly the task of determining whether what sounds alike is truly alike.