

1991

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### Recommended Citation

Philip C. Baxa and M William Krasilovsky, *Dawson v. Hinshaw Music, Inc.: The Fourth Circuit Revisits Arnstein and the 'Intended Audience' Test*, 1 Fordham Intell. Prop. Media & Ent. L.J. 91 (1991). Available at: <https://ir.lawnet.fordham.edu/iplj/vol1/iss2/1>

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# DAWSON V. HINSHAW MUSIC, INC.: THE FOURTH CIRCUIT REVISITS ARNSTEIN AND THE "INTENDED AUDIENCE" TEST

Philip C. Baxa\*  
M. William Krasilovsky\*\*

The Fourth Circuit's recent decision in *Dawson v. Hinshaw Music, Inc.*<sup>1</sup> considered the manner in which a plaintiff in a music copyright infringement case establishes substantial similarity of competing works. The court held that where the subject works were created for an audience which has special knowledge, skill or expertise, and where members of that audience will likely base their "purchasing decisions" upon their special knowledge, skill or expertise, the trier of fact must consider evidence of that audience's likely reaction to the competing works in determining whether the works are substantially similar. The court thus limited the "ordinary lay observer" test - which has been followed in music copyright cases since the Second Circuit's decision in *Arnstein v. Porter*<sup>2</sup> - to cases involving works created for the general public. Interestingly, these important and previously unresolved issues arose in a case involving competing derivative works: two arrangements of the Negro spiritual "Ezekiel Saw de Wheel", a song which is in the public domain. The case also involved a famous composer, arranger and conductor who, regrettably, did not live to learn of the Fourth Circuit's decision.

## A. Introduction: The Artistry of William L. Dawson

At his death in May, 1990 at the age of 89, William Levi Dawson was respected internationally as a composer, an arranger, and as the conductor of the famed Tuskegee Choir of Tuskegee Institute in Alabama.<sup>3</sup> Dawson's primary interest was in the traditional Negro spirituals, which Dawson believed expressed the emotions and experiences of the Negro slaves in America.<sup>4</sup> Those songs were not

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1. 905 F.2d 731 (4th Cir.), cert. denied, — U.S.—, 111 S.Ct. 511 (1990).

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

3. One of Dawson's most important triumphs was the 1934 performance of his "Negro Folk Symphony" by the Philadelphia Orchestra, the famous Leopold Stokowski conducting.

4. Schwartz, *Composers Who Had to Triumph Over Prejudice*, N.Y. Times,

composed by any individual songwriters, but were rather the creations of the generations of blacks which never knew economic, social or political freedom in America.

Dawson once stated that

[t]o interpret [the traditional spirituals] properly, one must become familiar with the conditions and circumstances which gave birth to them. It is equally important to study the characteristics of the music itself, to catch the mood and feel of it, in order to express adequately the sentiments that it embodies.<sup>5</sup>

Dawson's sentiment was shared by the great composer Bella Bartok, who also acknowledged the challenge inherent in arranging folk tunes and spirituals. The special character of that music, according to Bartok, required the arranger to

penetrate into [the music], feel it, and bring it out in sharp contours by the appropriate setting. The composition round a folk tune [or spiritual] must be done in a "propitious hour" or - as is generally said - it must be a work of inspiration just as much as any [original] composition.<sup>6</sup>

Thus, the creation of arrangements of spirituals and folk hymns require application of special talents and inspiration; and the creation of such derivative works is protected by the copyright laws, just like original scores.<sup>7</sup>

The arrangement which may ultimately bring Mr. Dawson's name

Apr. 15, 1990, sec. 2, at 29, col. 1 (late ed.) (hereinafter referred to as "Schwartz Article").

5. *Id.*

6. Smith, *Arrangements and Editions of Public Domain Music*, 34 CASE W. RES. L. REV. 104, 109 n.29 (1983).

7. See 17 U.S.C. §§ 101, 103 (1988). THE NEW OXFORD COMPANION TO MUSIC includes the following definition of a musical arrangement:

The adaptation to one musical medium of music originally composed for another - the recasting of a song as a piano piece, of an orchestral overture as an organ piece, and so on. . . .

Such a process, if undertaken seriously, involves much more than simply transferring passages from one medium to the other, since many passages that are effective on one instrument would sound ludicrous, or at any rate much less effective, on another. The arranger should consider, not how nearly he can reproduce a given passage in the new medium, but rather how the composer would have written it had that medium been the original one.

THE NEW OXFORD COMPANION TO MUSIC 107-8 (1983). See also COMPENDIUM OF COPYRIGHT OFFICE PRACTICES (COMPENDIUM II) § 408.01 (1984). ("A musical arrangement is a work which results from the addition of a new harmony to a preexisting work. The standard of originality for arrangements takes into consideration the fact that a melody carries with it a certain amount of implied harmony."); U.S. DEPARTMENT OF LABOR DICTIONARY OF OCCUPATIONAL TITLES (4th ed. 1977) ("Arranger" is one who "transcribes musical compositions for orchestra, band, choral group, or individual to adapt composition to particular style for which it is not originally written: Determines voice, instrument, harmonic structure, rhythm, tempo, and tone balance to

the most attention - certainly, at least, in the legal profession - is his interpretation of the Negro spiritual "Ezekiel Saw de Wheel", a traditional song which is in the public domain. That arrangement was the subject to the Fourth Circuit's decision in *Dawson v. Hinshaw Music, Inc.*, which restated the "substantial similarity" test which has been applied in music copyright cases for almost fifty years. In restating the test, the court focused on the purpose underlying the protection of copyrights: to ensure creators may benefit economically from their labors.

### B. *Arnstein and the "Substantial Similarity" Test*

Judge Frank's opinion in *Arnstein v. Porter*<sup>8</sup> is recognized as one of the leading early decisions in music copyright law. The case involved alleged infringements of several popular songs. In reversing in part a summary judgment for the defendant, the Second Circuit held that a plaintiff alleging music copyright infringement must first prove that it has a valid copyright, and that the infringer had access to the subject work.<sup>9</sup> Once those elements are established, the plaintiff must show the substantial similarity of the competing works: the similarity not only of the "general ideas" of the works - referred to as the objective component of the substantial similarity test - but also the expression of those ideas, or the subjective component of the test.

The *Arnstein* court stated that to demonstrate competing works are objectively similar, testimony by trained professional musicians of their analysis or dissection of the competing works is relevant.<sup>10</sup> The *Arnstein* court further held that since the competing works at issue were popular songs played for and sold to the general public, the subjective component of the test - which considered, among other things, whether the competing works evoked the same feelings and emotions - was to be determined by the "ordinary lay hearer", without the benefit of any help from the experts. The court explained that

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

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achieve desired effect. Writes score utilizing knowledge of music theory and instrumental and vocal capabilities.")

8. 154 F.2d 464 (2nd Cir. 1946).

9. *Id.* at 468.

10. *Id.*

something which belongs to the plaintiff.<sup>11</sup>

Thus, if the competing work incorporated such significant portions of the original work which as might affect a potential buyer's decision to purchase the work, then there was copyright infringement.<sup>12</sup>

The test set forth in *Arnstein* makes sense when applied to competing works of popular music which were sold to the general public. For instance, *ABKCO Music, Inc. v. Harrison's Music, Ltd.*<sup>13</sup> involved the alleged infringement of George Harrison's "My Sweet Lord" of the Chiffon's hit song "He's So Fine". Given that recordings of the songs were intended to be played for and sold to the public at large, the purchasing audience would, indeed, be the ordinary, untrained observer. In such an instance, it was appropriate - and necessary - to play the competing works for the fact finder.

An issue that remained unresolved for years after *Arnstein*, however, was whether the ordinary observer test was applicable where the subject work was intended for a narrower audience.<sup>14</sup> A key decision concerning the ordinary observer test outside the music copyright area helped change the focus of the ordinary observer test. *Whelan Associates v. Jaslow Dental Laboratory, Inc.*<sup>15</sup> involved competing computer programs that were so complicated that it was impossible to expect a lay jury or a judge sitting without a jury

11. *Id.* at 473 (footnotes omitted) (emphasis added).

12. In his dissenting opinion in *Arnstein*, Judge Clark bemoaned the invasion of the hallowed halls of justice by the sounds of popular music. Judge Clark complained that

the tinny tintannabulations of the music thus canned resounded through the United States Courthouse to the exclusion of all else, including the real issues in this case. Of course, sound is important in a case of this kind as to falsify what the eye reports and the mind teaches. Otherwise, plagiarism would be suggested by the mere drumming of repetitious sound from our usual popular music, as it issues from a piano, orchestra or hurdy gurdy — particularly when ears may be dulled by long usage, possible artistic repugnance or boredom, or mere distance, which causes all sounds to merge. And the judicial eardrum may be peculiarly insensitive after long years of listening to the 'beat, beat, beat,' . . . of sound upon it, though perhaps no more so than the ordinary citizen juror — even if tone deafness is made a disqualification for jury service, as advocated.

154 F.2d at 475-76.

13. 420 F. Supp. 177 (S.D.N.Y. 1976), *later opinion*, 508 F. Supp. 788 (S.D.N.Y. 1981), *modified*, 722 F.2d 988 (2d Cir. 1983).

14. Over the years, the copyright decisions which purported to apply *Arnstein* were not always consistent, and did not always comprehend - let alone resolve - those matters left by *Arnstein*. The courts' applications of *Arnstein* have been described as "spotty" and "uneven". See 3 NIMMER ON COPYRIGHT § 13.03(E)(3d ed. 1989). Compare, e.g., *Aliotti v. R. Dakin & Co.*, 831 F.2d 898 (9th Cir. 1987) and *Sid & Marty Krofft Television, Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977) with *Baxter v. MCA, Inc.*, 812 F.2d 421 (9th Cir.), *cert. denied sub nom.*, *Williams v. Baxter*, 484 U.S. 954 (1987).

15. 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031, 107 S.Ct. 877, 93 L.Ed. 2d 831 (1987).

to make comparisons for substantial similarity without expert witness assistance. The Third Circuit held in *Whelan* that the ordinary observer test simply could not be applied where the original work was beyond the comprehension of the ordinary general public. *Whelan* was a logical decision as applied to complex computer programs; an issue left unresolved was whether the courts would apply the same analysis to other subject areas, including the music industry.

### C. The Trial Court's Decision

"Ezekiel Saw De Wheel" was first published in 1940 by John W. Work in a collection of spiritual and folk hymns. The words and melody of "Ezekiel" are in the public domain.<sup>16</sup> Dawson registered his copyright of his arrangement of "Ezekiel" with the United States Copyright Office in 1942.<sup>17</sup> Over the next twenty-five years, Dawson - acting as his own publisher - sold thousands of copies of the sheet music of his arrangement.<sup>18</sup> Since 1967, Kjos Music has served as Dawson's exclusive agent for the sale and distribution of the arrangement, and has sold in excess of 113,000 copies of the sheet music.<sup>19</sup>

Gilbert M. Martin, a graduate of Westminster Choir College, composed an arrangement of "Ezekiel" in 1980.<sup>20</sup> That same year, Martin granted to Hinshaw Music, Inc. the exclusive right to publish, distribute and sell his arrangement. In 1981, Hinshaw obtained a copyright of Martin's arrangement and began publication and sales of the sheet music.<sup>21</sup>

When Dawson became aware of Martin's arrangement, he notified Hinshaw that he considered it to be an unlawful infringement of his copyrighted arrangement. Hinshaw suspended distribution of the Martin arrangement in 1981, but resumed publication the next year.<sup>22</sup>

In June 1986, Dawson filed suit in the United States District Court for the Middle District of Louisiana, alleging that Hinshaw had infringed on his copyright by publishing the Martin arrangement of "Ezekiel". Thereafter, Dawson added Martin as a defendant, and the case was later transferred to the Middle District of North Carolina.

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16. Findings of Fact and Conclusions of Law entered December 21, 1988, by the trial court in *Dawson v. Hinshaw Music, Inc.*, United States District Court for the Middle District of North Carolina, Durham Division (hereinafter cited as "Findings") at 2.

17. Registration No. e. Pub. No. 108,496.

18. Findings at 2.

19. *Id.* at 2-3.

20. *Id.* at 3-4.

21. *Id.* at 4.

22. *Id.* at 7.

A bench trial was held on August 22-24, 1988, before the Honorable Hiram H. Ward. The exhibits introduced at trial included the sheet music of the Work song, the sheet music of the two competing arrangements of "Ezekiel", and the sheet music of other arrangements of the song. The witnesses who testified included Dawson, Martin, representatives of Kjos Music and Hinshaw Music, and five experts retained by the parties.<sup>23</sup>

In his Findings of Fact and Conclusions of Law, Judge Ward held that Dawson owned a valid copyright to his arrangement of "Ezekiel".<sup>24</sup> The court stated that a rebuttable presumption of copying would arise if Dawson proved 1) that Martin had access to the copyrighted work, and 2) that there was a substantial similarity between the Dawson work and the Martin work.<sup>25</sup>

The trial court found that defendant Martin has the requisite access to Dawson's arrangement through his access to the facilities of Westminister Choir College and Lorenz Publishing Company;<sup>26</sup> his extensive experience in arranging, conducting and performing choral works; Dawson's reputation as an arranger and director of choral music; the widespread distribution of Dawson's arrangements; and the specialized and narrow field of music within which Dawson's arrangement was created.<sup>27</sup>

The trial court then turned its attention to the substantial similarity test. On the objective component of the test, the trial court considered the experts' analysis and dissection of the arrangements. Dawson's experts on this issue were Dr. Robert Campbell and Dr. Herndon Spillman; defendants' experts were Drs. Alice Parker, Wilton Mason, and Joel J. Carter. The court found the testimony of Dawson's experts compelling, and concluded that "the pattern, theme and organization of [Dawson's] arrangement is unique among any other arrangement" of "Ezekiel".<sup>28</sup> The court accepted Dr. Spillman's testimony that Martin not only used the same arranging devices as Dawson, but also organized those devices in the same exact pattern or structure as the Dawson work, and employed them in the same sequence and place as the Dawson work.<sup>29</sup> The trial court further noted that defendants did not refute that testimony; and, in fact, their experts had only reinforced the similarities in the works.<sup>30</sup> The court thus held that the two arrangements were sub-

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23. Excerpts of transcript trial proceedings, joint appendix.

24. Findings at 2.

25. *Id.* at 9-11.

26. Interestingly, Dawson's arrangement had been dedicated to the then President of Westminister, Dr. J. Finley Williamson. *Id.* at 11.

27. *Id.* at 11-13.

28. *Id.* at 14-18. The trial court listed twenty-two similarities and nine differences between competing arrangements. See Findings at 4-7.

29. *Id.* at 16-17.

30. *Id.* at 17-18.

stantially similar under the objective component of the test.<sup>31</sup>

Judge Ward then addressed what he considered the dispositive issue: whether Dawson had satisfied the subjective component of the test, under which the court, "unaided by analytic dissection or expert testimony," was to see if it could "'recognize the alleged copy as having been appropriated from the copyrighted work.'"<sup>32</sup> The court noted that Dawson had failed to present any evidence other than the printed sheet music of the arrangements, which the court deemed insufficient proof of substantial similarity in the expression of the idea. The court specifically stated that the expert testimony which it had found so persuasive on the objective component of the test was "irrelevant to and inadmissible under the second prong to show substantial similarity constituting infringement of expression."<sup>33</sup> The court stated Dawson's failure to play the competing arrangements for the court was a fatal flaw in the case, despite the fact 1) that Dawson and Martin had both benefited financially not from sales of recordings of the music to the public, but rather from sales of the sheet music, and 2) that there was no evidence that recordings of either arrangement were ever sold to the public or even existed.

The trial court's conclusion is interesting given remarks made early in the course of the proceeding which strikes at the heart of the *Dawson* case and the "audience test". In responding to counsel's question on the first day of trial concerning the admissibility of expert testimony, Judge Ward stated as follows:

Well, Rule 702 [of the Federal Rules of Evidence] seems to cover this just like a blanket covers a bed. I am not a musician. I was exposed to it a couple of years when I was a teenager. I appreciate good music. I appreciate music whether it's good or bad, for the most part. *But this is a very technical thing and I am going to rely on experts with reference to the substantial similarity test.* Also I think I have enough experience to not depend on expert testimony when they go beyond their field of expertise.<sup>34</sup>

Interestingly, and as noted above, the trial court had based its finding that Martin had the requisite access to Dawson's arrangement in part upon the observation that the competing arrangements were made in "the specialized and narrow field" of sacred Negro spiritual music. The trial court did not profess to have any knowl-

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31. *Id.* at 16-18.

32. *Id.* at 18-19 (quoting *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir. 1966)).

33. *Id.* at 20.

34. Trial Transcript at 3-4 (emphasis added). Under Rule 702, [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.



edge of or experience in that field, let alone the ability to read and understand the sheet music of the competing arrangements. Nor did the trial court consider whether there was a special audience for which the sheet music was intended to be sold. And despite Judge Ward's stated intent to rely on the experts, all of whom were familiar with "the specialized and narrow field" of sacred Negro spiritual music, and could read and understand the sheet music, he completely ignored their testimony as such applied to the central issue of the case.

#### D. *The Fourth Circuit's Analysis*

On appeal, the Fourth Circuit re-examined *Arnstein* against the backdrop of "the recognized purpose of the copyright laws of providing creators with a financial incentive to create for the ultimate benefit of the public."<sup>35</sup> The Fourth Circuit recognized that the *Arnstein* court had correctly applied an ordinary "lay listener" test because the music at issue in that case was intended for sale to the public at large. Thus, the reaction of the untrained lay listener would gauge how the infringer's work might affect the plaintiff's intended market.<sup>36</sup>

The Fourth Circuit further concluded, however, "where the intended audience is significantly more specialized than the pool of lay listeners, the reaction of the intended audience would be the relevant inquiry."<sup>37</sup> The court cited with approval the Ninth Circuit's decision in *Sid & Marty Krofft Television v. McDonald's Corp.*<sup>38</sup> which involved a claim of infringement by the creators of "H.R. Pufnstuf" children's television show against McDonald's for production of its "McDonaldland" television commercials. There, the Ninth Circuit wrote that

[t]he present case demands an even more intrinsic determination because both plaintiffs' and defendants' works are directed to an audience of children. This raises the particular factual issue of the impact of the respective works upon the minds and imagination of young people.<sup>39</sup>

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35. *Dawson v. Hinshaw Music, Inc.*, 905 F.2d 731, 733 (4th Cir.) *cert. denied*, — U.S. —, 111 S.Ct. 511, — L.Ed. 2d — (1990).

36. *Id.* at 734.

37. *Id.*

38. 562 F.2d 1157 (9th Cir. 1977).

39. *Id.* at 1166. *See also* *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 902 (9th Cir. 1987) (because children comprised the intended market for the parties' competing dolls, the court should "filter the intrinsic inquiry through the perception of children"); *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 614 (7th Cir.), *cert. denied*, 459 U.S. 880, 103 S.Ct. 176, 74 L.Ed.2d 145 (1988) (where products were intended for the child audience, products must be viewed from the perspective of that audience).

The Fourth Circuit also cited with approval the Third Circuit's decision in *Whelan Associates v. Jaslow Dental Laboratory*,<sup>40</sup> which, as discussed above, involved a claim of infringement of a custom computer program for dental laboratory records which was so sophisticated as to be completely unfamiliar to most members of the general public. In reflecting on the subject of *Whelan*, the Fourth Circuit stated that

only a reckless indifference to common sense would lead a court to embrace a doctrine that requires a copyright case to turn on the opinion of someone who is ignorant of the relevant differences and similarities between two works. Instead, the judgment should be informed by people who are familiar with the media at issue.<sup>41</sup>

That logic led the Fourth Circuit to the conclusion that the second prong of the substantial similarity test should truly be labeled the "intended audience" rather than the "ordinary observer" test.<sup>42</sup> The court stated that, in most instances, the lay public would likely represent the intended audience; and in those circumstances, the competing works should be presented to the untrained lay person for determination of copying. If the intended audience, however, is indeed narrower than the general public in that it possesses specialized expertise that may affect the "purchasing decision", the trier of fact must focus on whether a member of the intended audience would find the two works substantially similar.<sup>43</sup> Thus, "testimony from members of the intended audience or, possibly, from those who possess expertise with reference to tastes and perceptions of the intended audience" would be relevant.<sup>44</sup>

The Fourth Circuit thus concluded that Dawson's failure to present recordings of the competing arrangements may not have been fatal to his case. If the audience Dawson sought had specialized expertise relevant to its purchasing decisions, the competing sheet music alone may have been sufficient evidence of infringement.<sup>45</sup> The Fourth Circuit remanded the case for consideration of whether Dawson's spiritual arrangement had an intended audience narrower than the broad audience to which the common "love ditty [is] pitched."<sup>46</sup> The district court was further instructed that if on remand it determined that definition of a distinct audience in the case is appropriate, the "court should then take additional evidence to

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40. 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031, 107 S.Ct. 877, 93 L.Ed.2d 831 (1987).

41. *Dawson*, 905 F.2d at 738.

42. *Id.* at 737.

43. *Id.* at 736.

44. *Id.*

45. In fact, putting recordings of the works into evidence could be misleading, given the testimony at trial that a choral director's interpretation of the arrangement would affect the sound. *Dawson*, 905 F.2d at 737.

46. *Id.* at 737.

determine whether members of the intended audience would find the arrangements substantially similar."<sup>47</sup>

### E. CONCLUSION

The Fourth Circuit's analysis of the substantial similarity test certainly is sound given the facts adduced at trial. The evidence established that Dawson created an arrangement of "Ezekiel" which had a unique pattern, theme and organization. That arrangement was commercially significant, as thousands of copies of sheet music were sold over the years; yet there was no evidence Dawson made any sales of recorded versions of his arrangement. In light of the principal underlying objective of copyright law - to protect the economic benefits of creators - the nature of the market for which Dawson directed his arrangement was critical.

The *Dawson* decision is the logical outgrowth not only of *Whelan* but of the principles stated in *Arnstein* almost fifty years ago. In this connection, the sharply different factual backgrounds of the cases serves to frame the issues critical in music copyright infringement litigation. In cases such as *Arnstein*, which involve popular music such as a Billboard top-twenty song - the "love ditty" referred to by the Fourth Circuit - the ordinary lay observer test is appropriate. Certainly, there is no prerequisite that a purchaser of that kind of music be able to read and understand a musical score. Therefore, the ordinary lay person, unskilled and untrained in music, should be in a position to determine if the creator of the allegedly infringing work took from the original work that which made it commercially significant.

That analysis should not apply, however, to sophisticated works such as choral sheet music. While a musical arrangement may not be as complex as the computer program at issue in *Whelan*, detailed analysis of sheet music relating to multipart choral arrangements does require musical training. The intended audience for such a choral piece is not the listening audience, nor even the average member of a chorus which might sing the work; but rather, a choral director, teacher or other trained professional in the field who would decide whether to purchase the music. In that scenario, the mere process of selecting music is a sophisticated act of a professionally skilled and trained musician. Thus, it is appropriate for the court to consider opinion testimony from qualified witnesses having specialized knowledge of the field to assist the trier of fact in order to understand the works and the likely reaction of the intended audience.

The Fourth Circuit's decision also makes sense in light of Rule 702 of the Federal Rules of Evidence which, as Judge Ward sug-

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47. *Id.* at 738.

gested, did fit this case "just like a blanket covers a bed."<sup>48</sup> When an expert's testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue," that testimony is admissible and relevant under Rule 702. If the trier of fact can understand and appreciate the competing works in a music copyright case without an expert's help, opinion evidence should not be admitted.<sup>49</sup>

The Fourth Circuit did not attempt to create a specific test for determining whether the ordinary lay observer test is appropriate in particular circumstances. That issue must be resolved on a case-by-case basis according to the applicable facts. The Fourth Circuit cautioned against departure "from the lay characterization of the ordinary observer test."<sup>50</sup> Only where the facts proved that an intended audience has knowledge that the lay public lacks should a court look to a special, narrow group as the intended audience.<sup>51</sup>

Because the *Dawson* case was settled after the denial of *certiorari*, the question of whether the ordinary lay observer test was appropriate in the particular circumstances will remain unresolved. The issue of whether there is an intended audience "possessing specialized knowledge relevant to its purchasing decision" is one that will likely be raised frequently in copyright cases after *Dawson*.

A quote attributed to William Dawson appearing in his biography in *Who's Who* reads as follows: "I believe that an individual seldom does his best in any performance. Regardless of how well I perform an act, the feeling remains that it is possible to do it better; therefore, I always strive for improvement."<sup>52</sup> The Fourth Circuit's decision - issued just four weeks after Mr. Dawson's death - may serve to improve the protection that composers of musical works will receive in their pursuit of musical success. It is perhaps fitting that even in death Mr. Dawson's name will continue to be associated with the success of musicians and artists.

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48. Trial Transcript at 3.

49. See generally M. F. Sitzer, *Copyright Infringement Actions: The Proper Role for Audience Reactions in Determining Substantial Similarity*, 54 S. CAL. L. REV. 385 (1981).

50. 905 F.2d at 737.

51. *Id.*

52. 1 WHO'S WHO IN AMERICA 778 (43rd ed. 1984-1985).

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# Ezekiel Saw de Wheel

By Dr. J. Finlay McMillan and the Vestalator Choro

Set for Chorus by  
**WILLIAM L. DAWSON**

Allegro moderato (M.M. ♩ = about 118)

**SOPRANO**

**ALTO**

**TENOR**  
E-z-e-kul saw de wheel, 'Way up in de mid'l of de air, E-

**BASS**

Allegro moderato (M.M. ♩ = about 118)

**PIANO**  
(only for rehearsal)

**S**

**A**

**T**  
ze-kul saw de wheel, Way in de mid'l of de air E-z-e-kul saw de

**B**  
E-z-e-kul saw de

\*Pronounce EZEKUL when singing.

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Tuskegee Institute, Ala.

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S. \_\_\_\_\_  
 A. \_\_\_\_\_  
 T. \_\_\_\_\_  
 B. \_\_\_\_\_

wheel, 'Way up in de mid'l of de air, E - ze-kul saw de wheel,  
 wheel, 'Way up in de mid'l of de air, E - ze-kul saw de wheel,

S. \_\_\_\_\_  
 A. \_\_\_\_\_  
 T. \_\_\_\_\_  
 B. \_\_\_\_\_

E - ze-kul saw de wheel 'Way up in de  
 E - ze-kul saw de wheel wheel in de  
 Way in de mid'l of de air. E - ze-kul saw de wheel in de  
 Way in de mid'l of de air. E - ze-kul saw de wheel in de

S  
mid' of de air, E - ze-kul saw de wheel, Way in de mid' of de air,

A  
mid' of de air, E - ze-kul saw E - ze-kul saw de wheel, Way in de mid' of de air,

T  
mid' of de air, E - ze-kul saw E - ze-kul saw de wheel, Way in de mid' of de air; De

B  
mid' of de air, E - ze-kul saw E - ze-kul saw de wheel, Way in de mid' of de air;

S  
De lit' wheetruby de grace \_\_\_\_\_ of God, A wheel in a

A  
De lit' wheetruby de grace \_\_\_\_\_ of God, A lit' wheel in a

T  
ble wheetruby by faith, An' de lit' wheetruby de grace of God, A lit' wheel in a

B  
A lit' wheel in a

ETZARIL SAW DE WHEEL - 12 (Wind Chorus)

S. wheel, 'Way in de midl' of de air. Hum  
 A. wheel, 'Way in de midl' of de air. Solo Hum  
 T. wheel, 'Way in de midl' of de air. Bet-ter mind my brother how you walk on de cross,  
 O!e Sa-tan wears a Club foot shoe,  
 B. wheel, 'Way in de midl' of de air.

S. 'Way in de midl' of de air, Hum  
 A. 'Way in de midl' of de air, Hum  
 T. Your foot might slip, An' yer soul get lost,  
 If you don't mind be'n slip it on you.  
 B. 'Way in de air. Hum

\* First verse sung to notes with stem turned upward. Second verse sung to notes with stem turned downward.  
 CROSS. S. of a KILL - 12 (Mixed Chorus)



Soprano (S): *mf* 'way in de midl of de air. air.

Alto (A): *mf* 'way in de midl of de air. air.

Tenor (T): *mf* 'way in de midl of de air. air. E-zo-kul saw de wheel, 'way up in de midl of de air, E-  
*mf*

Bass (B): *mf* 'way in de midl of de air. air. E-zo-kul saw de wheel, 'way up in de midl of de air, E-

Piano accompaniment: *mf*

Soprano (S): *p* E-zo-kul saw de wheel. In de air; De

Alto (A): *p* E-zo-kul saw de wheel in de air; De

Tenor (T): ze-kul saw de wheel, 'way in de midl of de air...

Bass (B): ze-kul saw de wheel, 'way in de midl of de air;

Piano accompaniment: *p*

THE WHEEL - 12 (Mixed Chorus)



Soprano: big wheel run by faith, An' de life wheel run by de grace of God, A wheel in a wheel,  
 Alto: big wheel run by faith, An' de life wheel run by de grace of God, A wheel in a wheel,  
 Tenor: An' de life wheel run by de grace of God, A wheel in a wheel,  
 Bass: De big wheel run by faith, And de grace of God, A wheel in a wheel,



Soprano: 'Way in de mid' of de air. Some go to  
 Alto: 'Way in de mid' of de air... Some go on  
 Tenor: 'Way in de mid' of de air... Some on to  
 Bass: 'Way in de mid' of de air. Some go to church for de king an' shunt,

church to' to sing an' shout... Hal-le - lu, ... hal-le - lu, hal-le - lu, hal-le - lu -

church to' to sing an' shout... Hal-le - lu, ... hal-le - lu, hal-le - lu, hal-le - lu -

church to' to sing an' shout... Hal-le - lu, ... hal-le - lu, hal-le - lu, hal-le - lu -

Hal-le-lu, hal-le-lu, hal-le-lu, hal-le-lu -

jah! 'Way in count' of de air.

jah! 'Way in count' of de air.

jah! 'Way in count' of de air.

jah! Be - fo' six month dey's show'd out 'way in count' of de air

they are

SPRING LAW OF WHEEL - 12 (Mixed Chorus)

T110

S. \_\_\_\_\_

L. \_\_\_\_\_

A. **4 ALTOS** \_\_\_\_\_

**2 FIRST TENORS and 2 BARI-TONES**

T. *doom - a - loom - a, doom - a - loom - a, doom - a - loom - a, doom - a - loom - a,*

T. *doom - a - loom - a, doom - a - loom - a,*

B. \_\_\_\_\_

S. \_\_\_\_\_

A. \_\_\_\_\_

A. *doom - a - loom - a, doom - a - loom - a, doom - a - loom - a, doom - a - loom - a,*

T. *doom - a - loom - a, doom - a - loom - a, doom - a - loom - a, doom - a - loom - a,*

T. *doom - a - loom - a, doom - a - loom - a,*

B. *doom - a - loom - a,*

11 Repeat this section (8 measures) four times in the following order.

12 Repeat this section (8 measures) four times in the following order. 1st time: Sopranos sing their respective parts and continue repeating with soprano. 2nd time: All sopranos sing the 2nd soprano part in unison. 3rd time: Sopranos sing their respective parts in the end of the piece.

SOPRANOS

ze-kul saw de wheel, 'Way up in de  
*on repeat, poco a poco cresc.*

ALTOS  
*p* wheel in-a, wheel in-a, wheel in-a,  
*sffz* wheel in-a wheel in-a, wheel in-a wheel in-a, wheel in-a wheel in-a,  
*sffz* wheel in-a wheel in-a, wheel in-a wheel in-a, wheel in-a wheel in-a,  
*sffz*

4 ALTOS  
*p* first and second  
*on repeat, poco a poco cresc.*  
*p* doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, doom-a-loom-a.

2 FIRST TENORS  
 2 BARITONES  
*on repeat, poco a poco cresc.*  
*p* doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, doom-a-loom-a.

TENORS  
*on repeat, poco a poco cresc.*  
 ze-kul saw de wheel, 'Way up in de  
*on repeat, poco a poco cresc.*

BASSES  
*p* wheel in-a, wheel in-a, wheel in-a,  
*sffz* wheel in-a, wheel in-a, wheel in-a,  
*sffz* wheel, wheel, wheel, wheel, wheel, wheel,  
*sffz*

PIANO  
*on repeat, poco a poco cresc.*  
*p* *sffz* *sffz* *sffz* *sffz*

mid' of de air, E - ze-kul saw de wheel,

wheel in - a, wheel in - a, wheel in - a,

wheel in - a wheel in - a wheel in - a wheel in - a wheel in - a wheel in - a

doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, doom-a-loom-a,

doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, doom-a-loom-a,

mid' of de air, E - ze-kul saw de wheel,

wheel in - a, wheel in - a, wheel in - a,

wheel, wheel, wheel, wheel, wheel, wheel,

*sffz*

LEADER Saw DE WHEEL - 12 (Wheel Chorus)

The musical score consists of several systems of staves. The top system shows a vocal line with lyrics: "Way in de midl of de air. K- air. K-". The second system features a vocal line with lyrics: "wheel in-a wheel in-a wheel in-a wheel in-a wheel in-a" and a piano accompaniment with lyrics: "wheel in-a wheel in-a wheel in-a wheel in-a wheel in-a". The third system has a piano accompaniment with lyrics: "doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, doom-a-loom-a". The fourth system has a piano accompaniment with lyrics: "doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, doom-a-loom-a". The fifth system shows a vocal line with lyrics: "Way in de midl of de air K- air. F-". The sixth system features a vocal line with lyrics: "wheel in-a wheel in-a wheel in-a" and a piano accompaniment with lyrics: "wheel, wheel, wheel, wheel, wheel, wheel". The seventh system shows a piano accompaniment with lyrics: "wheel, wheel, wheel, wheel, wheel, wheel".

ESTABLISHED BY THE BOARD OF MUSIC - 18 (New York)

*ff Molto cresc.*  
 ze-hul saw de wheel, 'Way up to de

*Molto cresc.*  
*ff* wheel in-a, wheel in-a, wheel in-a,  
*sfs* wheel in-a wheel in-a wheel in-a wheel in-a wheel in-a

*Molto cresc.*  
*ff* doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, doom-a-loom-a,

*ff Molto cresc.*  
 doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, doom-a-loom-a,

*ff Molto cresc.*  
 ze-hul saw de wheel, 'Way up to de

*Molto cresc.*  
*ff* wheel in-a, wheel in-a, wheel in-a,  
*sfs* wheel, wheel, wheel, wheel, wheel, wheel.

*Molto cresc.*  
*ff* *sfs* *sfs* *sfs* *sfs* *sfs*



The musical score consists of several systems of staves. The top system is a vocal line with lyrics: "mid' of de air, I - re-tul saw de wheel, 'Way in de". The second system continues the vocal line with lyrics: "wheel in - a, wheel in - a, wheel in - a, wheel in - a, wheel, 'Way in de". The third system is a piano accompaniment line with lyrics: "doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, wheel, 'Way in de". The fourth system continues the piano accompaniment with lyrics: "doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, doom-a-loom-a, wheel, 'Way in de". The fifth system is a vocal line with lyrics: "mid' of de air, I - re-tul saw de wheel, 'Way in de". The sixth system continues the vocal line with lyrics: "wheel in - a, wheel in - a, wheel in - a, wheel in - a, wheel, 'Way in de". The seventh system is a piano accompaniment line with lyrics: "wheel, wheel, wheel, wheel, wheel, 'Way in de". The eighth system is a piano accompaniment line with lyrics: "wheel, wheel, wheel, wheel, wheel, 'Way in de". The score includes various musical notations such as notes, rests, and dynamics like *ff*, *Ad libitum*, and *sfs*.

STANDARD MUSIC COMPANY - 12 (Wheel Chorus)

*ff a tempo*  
*str.*

mid - die of de, 'Way up in de air.

mid - die of de, 'Way up in de air.

mid - die of de, 'Way up in de air.

mid - die of de, 'Way up in de air.

mid - die of de, 'Way up in de air.

in de air

*a tempo*

*sfz sfz sfz sfz sfz*

\* If first sopranos can not sustain high E<sup>b</sup> without straining, have them sing with second soprano.

