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NOTE

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INTRODUCTION

Historically, courts viewed popular music with a curled lip and a suspicious eye. Arguably, it is this tendency that first inspired music infringement plaintiffs to introduce the testimony of music experts to bolster or legitimize their claims. In recent years the popular music industry has flourished, and the financial stakes in music infringement litigation have risen significantly. Not surprisingly, the testimony of

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1. In Arnstein v. Edward B. Marks Music Corp., 82 F.2d 275 (2d Cir. 1936), for example, Judge Learned Hand wrote that “[s]uccess in [popular love songs] is by no means a test of rarity or merit.” Id. at 277. In Darrell v. Joe Morris Music Co., 113 F.2d 80 (2d Cir. 1940) (per curiam), discounting similarities between the plaintiff’s song and an allegedly infringing song, the Court of Appeals for the Second Circuit noted that “while there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing; and much fewer still suit the infantile demands of the popular ear.” Id. (emphasis added). In Carew v. R.K.O. Radio Pictures, Inc., 43 F. Supp. 199 (S.D. Cal. 1942), the court noted that “[a] phrase from Beethoven, or from any other great composer, might linger in the mind of a student of music for many years,” but that “the trite phrasing of an ordinary popular song, with its limitations” could not. Id. at 200.

2. The term “infringement” in the copyright context is used generally to refer to a violation of any right granted to copyright owners by the 1976 Copyright Act. See 17 U.S.C. § 501(a) (1982). This Note, however, focuses on infringements in which part or all of a protected musical work is used in the writing of a “new” musical work.

3. This is not to say that the value of music experts has gone unquestioned. For example, one court commented on the “doubtful function of the expert as an aid to the court in this class of litigation.” Baron v. Leo Feist, Inc., 78 F. Supp. 686, 687 (S.D.N.Y. 1948), aff’d, 173 F.2d 288 (2d Cir. 1949). Another prided itself on its ability to endure “’with patience and fortitude’” music expert testimony which included “cacophonous demonstrations.” Northern Music Corp. v. King Record Distrib. Co., 105 F. Supp. 393, 398 (S.D.N.Y. 1952).

4. See J. Taubman, In Tune with the Music Business 51 (1980) (noting accelerated growth of recording industry); H. Vogel, Entertainment Industry Economics 156 (1986) (technological innovation has increased potential uses of music). Today there are more opportunities to exploit a popular song. For example, when licensed for advertising purposes, a popular song may have considerable earning power. Rather than using an original, unfamiliar jingle, manufacturers now frequently use established popular songs to sell their products. The Beatles’ “Revolution,” Cyndi Lauper’s “True Colors,” and the old standard, “I Don’t Want to Set the World on Fire” are among the songs that have been exploited in this way.

Popular song revenues have been further increased by the avid enforcement of the statutory performance right, see 17 U.S.C. § 106(4) (1982), by licensing organizations such as the American Society of Composers, Authors and Publishers (ASCAP), whose members are owners of music copyrights. See, e.g., Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc., 831 F.2d 77 (5th Cir. 1987); Billy Steinberg Music v. Cagney’s Pub, Inc., 1988 Copyright L. Dec. (CCH) ¶ 26,268 (N.D. Ill. April 8, 1988).

5. In 1987, a jury awarded a plaintiff over $500,000 in damages. See Gaste v. Kais-
experts has become commonplace. Both parties usually come armed with experts, and the ensuing battle often constitutes a significant segment of a music infringement trial.

In the context of copyright infringement suits, a significant court-made limitation has been imposed on expert testimony. This restriction on experts' participation was first articulated in *Arnstein v. Porter* in 1946 and later developed in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.* From the outset, the *Arnstein* limitation has been criticized for its impracticability. *Arnstein* developed the distinction between copying and improper appropriation, and used it as a boundary in determining the permissible scope of expert testimony. Although *Krofft* purported to clarify and explicate the *Arnstein* standards, its departures from *Arnstein* are significant and problematic, particularly in music infringement litigation. Moreover, *Krofft* failed to address the fundamental difficulties in applying the *Arnstein* principles.

This Note examines the role of the expert in music copyright infringement litigation. Part I analyzes *Arnstein v. Porter*, focusing on its discussion of the elements of copyright infringement and of the limitation on the use of expert testimony. In Part II, this Note reviews the *Krofft* standards, which purportedly incorporate and expound on the *Arnstein* principles.

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7. See, e.g., Record at 178-357, Selle v. Gibb, 567 F. Supp. 1173 (N.D. Ill. 1983) (No. 78-3656), aff'd, 741 F.2d 896 (7th Cir. 1984) (discussed infra notes 100-39 and accompanying text); see also R. Osterberg, supra note 6, at 6 (“It has become customary... to include in a music plagiarism trial detailed music analysis by experts, supported by charts, recordings and courtroom demonstrations on a piano or other musical instruments.”) (footnote omitted); Clark, *Copyright Litigation*, in Kraft, Using Experts in Civil Cases, 137, 138 (P.L.I. 1977) (Use of experts in copyright litigation is “firmly entrenched as a valuable and... often essential element in prosecuting or defending an action for copyright infringement.”).

8. The federal courts have exclusive jurisdiction over actions for infringement of statutory copyright. See 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 12.01[A], at 12-3 (1968) [hereinafter Nimmer]. The Copyright Act of 1976 exclusively governs the rights that together constitute a “copyright,” see 17 U.S.C. §§ 106, 301 (1982), but the statute invites incorporation and evolution of judicial doctrine in the area of infringement, see Nimmer, supra, § 12.11[D], at 12-83 (noting court-evolved principle that access and substantial similarity together create inference of copying).

9. 154 F.2d 464 (2d Cir. 1946).

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

11. See infra text accompanying notes 48 and 153.

12. See infra notes 82-98 and accompanying text.

13. 154 F.2d 464 (2d Cir. 1946).
principles. Noting significant dissimilarities, Part II critically compares the law of these cases. Part III illustrates the context in which the principles of *Arnstein* and/or *Krofft* should operate through an examination of the use of expert testimony in the *Selle v. Gibb* trial. Part III also summarizes the shortcomings of *Arnstein*. This Note concludes that, because of the general impracticability of the *Arnstein* limitations and the dubious applicability of the *Krofft* standards in music infringement litigation, analytic testimony by experts should not be limited to the issue of copying as required under *Arnstein*, but should also be considered on the ultimate issue of whether the copying constitutes an infringement.

I. *ARNSTEIN v. PORTER: THE LIMITATION ON EXPERT TESTIMONY*

A plaintiff must establish three elements to prove copyright infringement. First, the plaintiff must establish his ownership of a valid copyright. Second, the plaintiff must show that the defendant copied protected material. Third, the plaintiff must demonstrate that the defendant’s copying constituted “improper appropriation.”

The role of the expert in establishing the first element is virtually nonexistent. The expert plays a significant role, however, in establishing the element of copying. In fact, expert testimony is sometimes mandatory rather than permissive. However, a plaintiff may not rely on expert

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15. See W. Patry, Latman’s The Copyright Law 191 (1986).
16. See, e.g., Spectravest, Inc. v. Mervyn’s Inc., 673 F. Supp. 1486, 1490 (N.D. Cal. 1987) (citing Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp., 562 F.2d 1157, 1162 (9th Cir. 1977)). This element is demonstrated most easily by presenting the copyright certificate itself. See 17 U.S.C. § 410(c) (1982) (certificate of registration made before or within five years of first publication of the work constitutes prima facie evidence of the copyright’s validity).
17. Copying may be proved either directly, which is rare, or indirectly by demonstrating both access and “similarities or other factors circumstantially evidencing copying.” W. Patry, Latman’s The Copyright Law 195 (1986) (emphasis omitted) (citing Alexander v. Haley, 460 F. Supp. 40, 43 (S.D.N.Y. 1978)). Courts often refer to this showing of similarities as “substantial similarity,” which tends to confuse this type of circumstantial evidence of copying with the third element of copyright infringement. See id. at 193; see, e.g., Benson v. Coca-Cola Co., 795 F.2d 973, 974 (11th Cir. 1986) (“To establish copying, [plaintiff] must show that [defendant] had access to [plaintiff’s] song, and that [defendant’s] song is so substantially similar to [plaintiff’s] that ‘an average lay observer would recognize the alleged copy as having been appropriated from the original work.’”) (citation omitted); infra note 137.
18. See *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946). This element requires an evaluation of the substantiality and materiality of the similarities between the plaintiff’s work and the allegedly infringing work. See W. Patry, Latman’s The Copyright Law 193 (1986).
19. See infra notes 32-36 and accompanying text.
20. See, e.g., Testa v. Janssen, 492 F. Supp. 198, 203 (W.D. Pa. 1980) (expert testimony is required when a plaintiff seeks to dispense with direct proof of access and attempts to establish copying by showing that two works are “strikingly similar”); see also *Selle v. Gibb*, 741 F.2d 896, 905 (7th Cir. 1984) (because plaintiff’s expert failed to address issue of prior common source, plaintiff did not meet its burden of proving striking similarity, i.e., similarities “sufficiently compelling” in the absence of proof of access).
analysis to prove the third element—that defendant’s copying constituted improper appropriation.21 This delimitation of the expert’s role in infringement cases, first articulated in *Arnstein v. Porter*,22 is still followed.23

In *Arnstein*, the plaintiff24 charged Cole Porter with infringement of several of the plaintiff’s compositions.25 The district court granted defendant’s summary judgment motion26 and the plaintiff’s appeal27 afforded the Court of Appeals for the Second Circuit an opportunity to expound on, formulate and perhaps28 make sense of the requirements and applicable standards for infringement actions.29

The court distinguished the elements of copying and improper appropriation30 and discussed the types of evidence permissible to prove each. Under *Arnstein*, copying can be proved by the defendant’s admission or by circumstantial evidence—evidence of access31 combined with suffi-

21. See infra notes 37-42 and accompanying text.
22. 154 F.2d 464, 468 (2d Cir. 1946).
23. See infra notes 60, 99 and accompanying text.
24. The plaintiff, a rather litigious eccentric, had filed and lost five other plagiarism suits prior to *Arnstein v. Porter*. For a more complete discussion, see Orth, *The Use of Expert Witnesses in Musical Infringement Cases*, 16 U. Pitt. L. Rev. 232, 247 n.79 (1955).
25. *Arnstein*, 154 F.2d at 467. The allegedly infringing songs included such Porter standards as “Begin the Beguine,” “My Heart Belongs to Daddy,” “Night and Day,” and “You’d Be So Nice to Come Home To.” See id.
27. See *Arnstein*, 154 F.2d at 468.
28. The particularly incendiary dissent of Judge Clark casts significant doubts upon the merits of the court’s analysis and conclusions. See infra notes 47-57 and accompanying text.
30. This “improper appropriation” element, also known as “illicit copying,” was a new factor in the law of infringement. See Orth, *supra* note 24, at 249.
31. The evidence of access must establish “a reasonable possibility that the complaining work was available to the alleged infringer.” Selle v. Gibb, 741 F.2d 896, 901 (7th Cir. 1984) (emphasis in original); see also Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp., 562 F.2d 1157, 1172 (9th Cir. 1977) (“Access is proven when the plaintiff shows that the defendant had an opportunity to view or to copy plaintiff’s work.”). Note, however, that the plaintiff must establish “more than a ‘bare possibility’ of access.” Siskind v. Newton-John, 1987 Copyright L. Dec. (CCH) ¶ 26,113, at 21,102
cient similarities to permit an inference of copying. If the plaintiff lacks evidence of access, copying still may be inferred from similarities "so striking as to preclude the possibility that the plaintiff and defendant independently arrived at the same result." Expert dissection and analysis may be used to establish similarities and their sufficiency in proving copying. Thus, under Arnstein, the issue of copying may be decided with the aid of "analytic or other comparison of the respective musical compositions as they appear on paper or in the judgment of trained musicians."

Once copying is established, the plaintiff must prove the third element, improper appropriation, or illicit copying. On this issue, expert analysis and dissection of the music are not permissible. Instead, the test for improper appropriation relies on the "response of the ordinary lay hearer." In explaining the "lay hearer" test and the exclusion of expert analysis, the court stated:

As to the first—copying—the evidence may consist (a) of defendant's admission that he copied or (b) of circumstantial evidence—usually evidence of access—from which the trier of the facts may reasonably infer copying. . . . If there is evidence of access and similarities exist, then the trier of the facts must determine whether the similarities are sufficient to prove copying. On this issue, analysis ("dissection") is relevant, and the testimony of experts may be received to aid the trier of the facts.

Arnstein, 154 F.2d at 468.

33. Id. The court explained that "a case could occur in which the similarities were so striking that we would reverse a finding of no access, despite . . . no evidence thereof other than the similarities." Arnstein, 154 F.2d at 469; see, e.g., Wilkie v. Santly Bros., Inc., 13 F. Supp. 136 (S.D.N.Y. 1935) (with no proof of access plaintiff prevailed in infringement action because of striking similarity), aff'd, 91 F.2d 978 (2d Cir.), cert. denied, 302 U.S. 735 (1937). But see Selle v. Gibb, 741 F.2d 896, 901 (7th Cir. 1984) (striking similarity considered in isolation is insufficient to establish access by circumstantial evidence).


35. See Arnstein, 154 F.2d at 468.

36. Id. at 473; see also id. at n.19 ("Where plaintiff relies on similarities to prove copying (as distinguished from improper appropriation) paper comparisons and the opinions of experts may aid the court.").

37. The court explained: "If copying is established, then only does there arise the second issue, that of illicit copying (unlawful appropriation)." Arnstein, 154 F.2d at 468.

38. "[T]he test is the response of the ordinary lay hearer; accordingly, on that issue, 'dissection' and expert testimony are irrelevant." Id. (footnote omitted). Note, however, that not all expert testimony is excluded. An expert's testimony may aid the factfinder in determining the reactions of lay hearers. See infra note 45 and accompanying text.

39. Arnstein, 154 F.2d at 468.
analysis and dissection, the court characterized the plaintiff's "protected interest" as "his interest in the potential financial returns from his compositions which derive from the lay public's approbation of his efforts." Under *Arnstein*, an action for infringement of a music copyright serves to compensate the plaintiff for the deprivation of potential financial returns that results from the defendant's copying. The issue, therefore, is "whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff." Thus, under *Arnstein*, the factfinder must determine the issue of illicit copying based on a hypothetical lay listener's aural comparison.

The *Arnstein* court reversed the district court's grant of summary judgment, and instructed the lower court as to what the plaintiff could use to prove his case on remand:

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

This language suggests that the jurors are not to decide illicit copying based on personal responses, but rather on how they perceive a "lay listener" would be likely to "react." Furthermore, expert testimony on this issue is permitted only for the purpose of determining the reactions of lay audiences. Thus, under *Arnstein*, the expert may testify as to the following: first, the expert's perceptions, based on analysis or dissection, of any similarities between the plaintiff's and the defendant's works (these perceptions are permissible evidence only on the issue of copying); and second, the expert's perception of a lay listener's perception of any similarities, which is the only expert testimony to be considered by the jury on the issue of improper appropriation.

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40. Id. at 473. Actionable copying, therefore, is copying that is violative of this interest. See infra note 147 and accompanying text.

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

42. For that reason, tone-deaf persons should be excluded from the jury. See id. at 473 n.22. The court suggested use of advisory juries for determination of this issue in bench trials. See id. at 473.

43. Id.

44. The analogy to the conduct of a "reasonably prudent person under the circumstances" in negligence law is apparent. See Metzger, *Name That Tune: A Proposal for an Intrinsic Test of Musical Plagiarism*, 34 Copyright L. Symp. (ASCAP) 139, 163 (1987).

45. The court stated that, although expert testimony of musicians may also be received, . . . it will in no way be controlling on the issue of illicit copying, and should be utilized only to assist in determining the reactions of lay auditors. The impression made on the refined ears of musical experts or their views as to the musical excellence of plaintiff's or defendant's works are utterly immaterial on the issue of misappropriation. *Arnstein*, 154 F.2d at 473.
Arnstein's definition of the expert's role in proving improper appropriation raises problems. Whether an expert, highly educated in the field of music theory, analysis, and history, can in fact hear again as a lay listener is speculative at best. It is also questionable whether the witness' qualifications as a music expert establish an expertise in the aural perceptions of a lay hearer. Whether a jury can be presumed to know what constitutes a "lay listener's" response is similarly problematic.\(^{46}\)

In his dissent, Judge Clark sharply criticized\(^{47}\) the court's analysis and construction of legal precedent:

I find nowhere any suggestion of two steps in adjudication of this issue, one of finding copying which may be approached with musical intelligence and assistance of experts, and another that of illicit copying which must be approached with complete ignorance; nor do I see how rationally there can be any such difference, even if a jury—the now chosen instrument of musical detection—could be expected to separate those issues and the evidence accordingly.\(^{48}\)

Judge Clark maintained that copyright infringement is actionable wherever there is actual copying, regardless of the degree to which the defendant used the plaintiff's work in the creation of his own.\(^{49}\) The sole issue, then, is whether "the claim of similarities [is] sufficient to justify the inference of copying."\(^{50}\) In Judge Clark's view, although "one may look to the total impression to repulse the charge of plagiarism where a minute 'dissection' might dredge up some points of similarity, . . . one must [not] keep his brain in torpor for fear that otherwise it would make clear differences which do exist."\(^{51}\) More simply stated, expert analysis and dissection should not be wholly disregarded merely because their abuse might lead to unjust results.

Noting that "[m]usic is a matter of the intellect as well as the emotions,"\(^{52}\) Judge Clark advocated a less restrictive use of music experts.\(^{53}\)

\(^{46}\) Cf. Whelan Assocs., Inc. v. Jaslow Dental Laboratory, Inc., 797 F.2d 1222, 1232-33 (3d Cir. 1986) (noting the doubtful value of the ordinary observer test in cases involving complex subject matter unfamiliar to most members of the public), cert. denied, 479 U.S. 1031 (1987). Music is among "the most baffling of the arts." N. Cook, A Guide to Musical Analysis 1 (1987). The accessibility of music, and its ability to involuntarily affect its listener do not render it simple subject matter, for music is the product of "the most apparently precise and rational techniques." See id.

\(^{47}\) Judge Clark characterized the court's opinion as "anti-intellectual and book-burning." Arnstein, 154 F.2d at 478 (Clark, J., dissenting).

\(^{48}\) Id. at 476 n.1.

\(^{49}\) See id.

\(^{50}\) Id.

\(^{51}\) Id. at 476.

\(^{52}\) Id. ("that is why eminent musical scholars insist upon the employment of the intellectual faculties for a just appreciation of music"). In this vein, Professor Kerman has written:

[T]here is nearly always some combination of feeling and thinking in our response to music, some combination of emotional and intellectual elements. This is true when popular music is in question just as much as with the more self-consciously "artistic" music of the concert hall. It is true that plenty of
although he also acknowledged the potential for abuse of expert dissection. Thus, Judge Clark advocated the use of experts on the overall issue of liability and firmly rejected the court's reliance on "what lay auditors may think of [the music]," because lay hearers are incompetent on the issue. He believed that chaos would result from the practice of making "all decisions of musical plagiarism . . . by ear, the more unsophisticated and musically naive the better." Although in previous cases the court had relied on "what seemed the total effect," it nonetheless had always "analyzed the music enough to make sure of an intelligible and intellectual decision."

II. **Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp. and Expert Testimony**

Despite the efforts of Judge Clark, the copyright infringement principles of *Arnstein* have endured. In particular, *Arnstein's* limitation on music lovers claim to enjoy music only for its emotional side and not for its intellectual side. . . But these people might ask themselves—for a start—whether the third or thirtieth time they listen to a folk song, rock number, or symphony movement, the same "gut reaction" they experienced the first time still persists in the same way. Is not memory now a consideration, and is not memory an intellectual process?


53. *Arnstein*, 154 F.2d at 476-77 (Clark, J., dissenting).

54. See id. at 477. Judge Clark noted that finding plagiarism on the basis of insignificant similarities, "by dint of extreme dissection," would be the same as finding "Shakespeare a plagiarist on the basis of his use of articles, pronouns, prepositions, and adjectives also used by others." *Id.; see O'Brien v. Thall*, 127 U.S.P.Q. 325, 326 (D. Conn. 1960) (Attempting to show similarities, plaintiff, "by force of arms," made changes in defendant's musical composition.), aff'd, 283 F.2d 741 (2d Cir. 1960); *see also Aaron Copland, What to Listen for in Music* 6 (2d ed. 1957) ("It is insufficient merely to hear music in terms of the separate moments at which it exists. You must be able to relate what you hear at any given moment to what has just happened before and what is about to come afterward.").

55. *See Arnstein*, 154 F.2d at 478 (Clark, J., dissenting).

56. *Id.* at 480.

57. *Id.* at 476.

58. Judge Clark did not acquiesce after *Arnstein*. Not a week later, in *Heim v. Universal Pictures Co.*, 154 F.2d 480 (2d Cir. 1946), Judge Clark again assailed the "novel conceptions of legal plagiarism first announced in the Arnstein case":

[T]he issue is no longer one of musical similarity or identity to justify the conclusion of copying—an 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.

*Id.* at 491 (Clark, J., concurring).

Nevertheless, the Court of Appeals for the Ninth Circuit, in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, attempted a bold refinement of the law in this area.

In *Krofft*, the plaintiffs claimed that the defendants' "McDonaldland" television commercials infringed their copyright in the "H.R. Pufnstuf" children's television show. The complaint also alleged infringement of various copyrighted articles of "Pufnstuf" merchandise because McDonald's had marketed a whole line of merchandise based on the characters in their commercials. At trial, the jury found in favor of the plaintiffs on the issue of infringement, and the Court of Appeals for the Ninth Circuit affirmed the judgment.

### A. The Idea-Expression Dichotomy Limitation

Apparently responding to previous misconstruction of the applicable law, the court included a detailed discussion of proof of infringement and superimposed the difficult doctrine of the idea-expression dichotomy upon the two-step infringement analysis of *Arnstein v. Porter*. The court presumed that the bifurcation of the *Arnstein* test had been motivated in fact by the then unarticulated doctrine of the idea-expression dichotomy. Professedly "not resurrect[ing] the *Arnstein* approach,"
Krofft established a similarly bifurcated test which, although significantly different, parallels the Arnstein test in that it delimits the use of expert testimony.

The Krofft court was dissatisfied with the infringement equation: proof of ownership + access + substantial similarity = infringement. Concerned that such a formulation would overextend the scope of copyright protection, the court strove to refine the formulation. The court reasoned that a "new dimension" should require that substantial similarity extend not only to general ideas, but also to the expression of those ideas. Therefore, the requirement of substantial similarity implies a two-step inquiry: first, whether there is substantial similarity of ideas, and, second, whether there is substantial similarity in the expression of the ideas.


The court appeared troubled that the formulation would produce some untenable results. For example, a copyright could be obtained over a cheaply manufactured plaster statue of a nude. Since ownership of a copyright is established, subsequent manufacturers of statues of nudes would face the grave risk of being found to be infringers if their statues were substantially similar and access were shown. Krofft, 562 F.2d at 1162-63 (emphasis added). The court attributed this unjust result in part to the minimal prerequisites for copyright registration. Id. at 1163 n.5. But, as even Krofft indicated, "the scope of protection against infringement is not necessarily coextensive with the scope of the copyright secured." Id. Perhaps better stated, the principle is that "the degree of protection afforded by the copyright [registration] is measured by what is actually copyrightable' in the materials, and not by the entirety of the submission" to the Copyright Office. Harcourt Brace & World, Inc. v. Graphic Controls Corp., 329 F. Supp. 517, 525 (S.D.N.Y. 1971) (quoting Dorsey v. Old Surety Life Ins. Co., 98 F.2d 872, 873 (10th Cir. 1938)). This rule of copyright law affords the alleged infringer far greater protection than the Krofft court acknowledges.

The court provided the following example to explain how the extrinsic test is to be applied: "the idea ... embodied [in a nude statue] 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." Id. This hypothetical is of little assistance in explaining the test, and in no way illuminates the need for and relevance of expert testimony. Intuitively, one would expect that ideas embodied by a work would be discernible without the assistance of experts. For example, in Aliotti v. R. Dakin & Co., 831 F.2d 898 (9th Cir. 1987), the extrinsic test was satisfied because "both lines of prod-
The issue of substantial similarity of expression of the ideas is "necessarily more subtle and complex," not because the similarity of expressions is hard to discern, but because the "expression" of the idea is difficult to distinguish from the idea itself. According to the *Krofft* court, the appropriate test of substantial similarity of expression is "an intrinsic one—depending on the response of the ordinary reasonable person." Expert testimony and analytic dissection are not to be considered on this issue.

**B. The Departures from Arnstein**

Rather than clarifying or adding "a new dimension," *Krofft*’s bifurcated substantial similarity test only muddies the waters. On the one hand, the court claimed that *Arnstein* is still good law, yet, on the other, expressly declined to "resurrect" it. Moreover, *Krofft*’s suggestion that its new formulation harmonizes with *Arnstein* cannot withstand even mild scrutiny.

According to *Krofft*, an infringement plaintiff must prove four elements:

1) ownership;
2) access;
3) substantial similarity of ideas; and
4) substantial similarity of expression of those ideas.

Under *Arnstein*, however, the plaintiff need prove only three elements:

1) ownership;
2) copying (access + similarities evidencing copying); and
3) improper appropriation.

*Krofft* equates its second and third elements with *Arnstein*’s second: "When the court in *Arnstein* refers to ‘copying’ which is not itself an

uacts depict the same subject matter—stuffed dinosaur toys." *Id.* at 900-01. Such an inquiry hardly requires the aid of expert analysis or dissection.

78. *Krofft*, 562 F.2d at 1164. Interestingly, the *Krofft* court adopted the "total concept and feel" approach, see *id.* at 1167 (citing Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970)); see also Hartman v. Hallmark Cards, Inc., 833 F.2d 117, 120-21 (8th Cir. 1987) ("[i]nfringement of expression occurs only when the total concept and feel of the works in question are substantially similar"), which by its very terms suggests that a finding of infringement can turn on similarities of concepts. By statute, however, concepts are expressly denied copyright protection. See 17 U.S.C. § 102(b) (1982).

79. *See Krofft*, 562 F.2d at 1164.

80. *Id.* In seemingly circular reasoning, the court explains that "it is intrinsic because it does not depend on the type of external criteria and analysis which marks the extrinsic test. . . . Because this is an intrinsic test, analytic dissection and expert testimony are not appropriate." *See id.*

81. *See id.*

82. *Id.* at 1164.

83. *See id.* at 1165.

84. *See id.* at 1165 n.7.

85. *See id.* at 1165, 1165 n.7.

86. Note that in some cases access may be inferred from striking similarities. *See supra* note 33 and accompanying text.
infringement, it must be suggesting copying merely of the work’s idea, which is not protected by copyright.” 87 Furthermore, Krofft suggests that its fourth element is similarly reflected in Arnstein’s third: “To constitute an infringement, the copying must reach the point of ‘unlawful appropriation,’ or the copying of the protected expression itself.” 88 Arnstein did not contemplate this type of qualitative distinction between material copied and material improperly appropriated, as Krofft presumes. Rather, Arnstein’s distinction was one of the degree to which defendant copied plaintiff’s work. 89 Moreover, if Krofft’s professed parallels to Arnstein’s test are followed through, the implication is that: access + substantial similarity of ideas = copying. Surely this seems less compelling circumstantial evidence of copying than that required by Arnstein, that is, access + sufficient similarities to evidence copying = copying. Indeed, in Krofft’s example, a cheap statue of a nude 90 would be “copied” 91 whenever another produced a cheap statue of a nude. 92

In short, Arnstein and Krofft are farther apart than Krofft suggests. Consequently, the role of expert analysis and dissection is necessarily different under Krofft and Arnstein. In Krofft, expert analysis and dissection may go only to the determination of whether there is a substantial similarity of ideas between the two works. In Arnstein, expert analysis and dissection may be considered on the issue of copying, that is, in identifying similarities which, with proof of access, evidence copying. In Krofft, expert analysis is not relevant to the determination of substantial similarity of expression of ideas; whereas, in Arnstein, expert dissection testimony is not to be considered on the ultimate issue of “improper appropriation.”

In music plagiarism cases, 93 application of the Krofft standards is even more problematical. Under Krofft, consideration of expert analysis and dissection hinges upon the nature of the works’ allegedly similar elements, that is, whether they constitute idea or expression. Generally, the idea-expression distinction has proved to be elusive. 94 In music, however, the distinction between idea and expression is, at best, chimerical.

87. Krofft, 562 F.2d at 1165. This is a flawed reading of Arnstein. Under Arnstein, “copying . . . is usually proved by circumstantial evidence of access to the copyrighted work and substantial similarities as to protectible material in the two works.” Reyher v. Children’s Television Workshop, 533 F.2d 87, 90 (2d Cir.) (citing Arnstein) (emphasis added), cert. denied, 429 U.S. 980 (1976).
88. Krofft, 562 F.2d at 1165.
89. See Arnstein, 154 F.2d at 473 (“The question, therefore, is whether defendant took from plaintiff’s work so much . . . that defendant wrongfully appropriated something which belongs to plaintiff.”) (emphasis added).
90. See supra note 72.
91. Infringement would not be the necessary finding.
92. See supra note 72.
93. Krofft was not such a case; Arnstein was.
94. See, e.g., Warner Bros. v. American Broadcasting Cos., 720 F.2d 231, 240 (2d Cir. 1983) (claim alleging infringement of “Superman” character); see also supra notes 67-69; infra note 96.
For example, consider the songs at issue in Bright Tunes Music Corp. v. Harrisongs Music, Ltd. In Bright Tunes, the court found that George Harrison's "My Sweet Lord" infringed the copyright of "He's So Fine." A strict application of Krofft would require that the factfinder consider expert analysis and dissection on the issue of substantial similarity of ideas, but disregard such testimony on the issue of substantial similarity of expression. This is not practicable. First, the ability of a jury to adequately comprehend the idea-expression dichotomy is doubtful; federal judges have found the doctrine difficult to apply since its inception. Furthermore, even assuming a basic understanding of the doctrine, its application to music as the subject matter of copyright poses a still greater hurdle. What of a song's music is "idea" and what is "expression"?

III. EXPERT ANALYSIS IN PRACTICE: Selle v. Gibb and the Shortcomings of Arnstein

Recent music plagiarism cases have, for the most part, ignored Krofft's introduction of the idea-expression dichotomy and adhered to the principles of Arnstein. Selle v. Gibb, a well-known music plagiarism case

96. See, e.g., Franklin Mint Corp. v. National Wildlife Art Exch., Inc., 575 F.2d 62, 65 (3d Cir.) ("Precision in marking the boundary between the unprotected idea and the protected expression ... is rarely possible."); cert. denied, 439 U.S. 880 (1978); see also supra notes 67-69, 94.
97. "Idea" has a very specific and different meaning in the vocabulary of musicians and composers. A musical "idea" is the composer's theme, his "gift from Heaven." Aaron Copland, supra note 54, at 23. Often the idea is a melody line. See id. Ironically, findings of infringement often are predicated upon musical "ideas," that is, melodic similarities. See, e.g., Northern Music Corp. v. King Record Distrib. Co., 105 F. Supp. 393, 398 (S.D.N.Y. 1952) (focusing on "substantial melodic similarity"); see also Siskind v. Newton-John, 1987 Copyright L. Dec. ¶ 26,113, at 21,103 (S.D.N.Y. May 22, 1987) (noting melody is the "most important feature of the music").
98. See Comment, An Improved Framework for Music Plagiarism Litigation, 76 Calif. L. Rev. 421, 443 (1988) ("In music there is no 'idea' or 'expression' to be distinguished."); cf. Franklin Mint Corp. v. National Wildlife Art Exch., Inc., 575 F.2d 62, 65 (3d Cir. 1978) ("Troublesome ... is the fact that the same general principles are applied in claims involving plays, novels, sculpture, maps, directories of information, musical compositions, as well as artistic paintings. Isolating the idea from the expression ... necessarily depend[s] to some degree on [what] the subject matter is.").
99. See, e.g., Benson v. The Coca-Cola Co., 795 F.2d 973 (11th Cir. 1986); Selle v. Gibb, 567 F. Supp. 1173 (N.D. Ill. 1983), aff'd, 741 F.2d 896 (7th Cir. 1984); Testa v.
tried before a jury in 1984, illustrates this substantial adherence to the forty-year-old Arnstein principles. The testimony of the plaintiff’s music expert was typical in structure and line of questioning, and was appropriately limited to the issue of copying.

In Gibb, the plaintiff, Ronald Selle, a part-time musician and composer, sued the Bee Gees\textsuperscript{101} for copyright infringement. Selle alleged that the Bee Gees’ song, “How Deep Is Your Love,” infringed the copyright of Selle’s song, “Let It End.” Unable to produce direct evidence of copying, Selle resorted to the circumstantial evidence formula: access + similarities evidencing copying = copying.\textsuperscript{102} Because Selle had no evidence of access, however,\textsuperscript{103} he sought to establish access by demonstrating striking similarity between the two works.\textsuperscript{104}

To achieve this, Selle relied heavily upon the testimony of his music expert. This, of course, comported with Arnstein because the issue of access pertains to proof of copying, for which expert dissection and analysis are appropriate.\textsuperscript{105}

A. The Expert Testimony\textsuperscript{106}

The structure of the direct examination was not unusual. Plaintiff’s counsel first established the general qualifications of the expert, Arrand Parsons.\textsuperscript{107} Parsons testified that he was qualified to make the compara-


100. 567 F. Supp. 1173 (N.D. Ill. 1983), aff’d, 741 F.2d 896 (7th Cir. 1984).

101. The Bee Gees are a group of three brothers, Barry, Maurice and Robin Gibb. They are internationally known performers and creators of popular music.

The plaintiff also named as defendants Paramount Pictures Corporation, which made and distributed the movie, “Saturday Night Fever,” the soundtrack of which featured the allegedly infringing song, “How Deep Is Your Love,” and Phonodisc, Inc., which made and distributed the cassette tape of the song.

102. See supra note 17.

103. See Selle v. Gibb, 567 F. Supp. 1173, 1181 (N.D. Ill. 1983) ("Plaintiff concedes he has no evidence that the Bee Gees . . . ever had the opportunity either to have seen the score of [plaintiff’s] song, or to have heard it played."). aff’d, 741 F.2d 896 (7th Cir. 1984).

104. See Gibb, 741 F.2d at 901. Arnstein expressly contemplates this type of proof of access, “[b]ut a case could occur in which the similarities were so striking that we would reverse a finding of no access, despite weak evidence of access (or no evidence thereof other than the similarities).” Arnstein v. Porter, 154 F.2d 464, 469 (2d Cir. 1946) (emphasis added).

105. See supra notes 31-36 and accompanying text.

106. Notably, defendants called no expert witness to testify during the trial, see Selle v. Gibb, 741 F.2d 896, 904 (7th Cir. 1984), although an analysis report for defendants by Harold Barlow, one of the leading music experts in the country, was the subject of part of a deposition by defendants of plaintiff’s expert, see Record at 275-78, 340-42, 344, Selle v. Gibb, 567 F. Supp. 1173 (N.D. Ill. 1983) (No. 78-3656), aff’d, 741 F.2d 896 (7th Cir. 1984). Barlow’s report noted the similarities of Selle’s song to other Bee Gees songs predating Selle’s composition. See id. at 276. Barlow also noted similarities to Beethoven and Handel. See id. at 342.

107. Parsons had been a music professor at Northwestern University for thirty years and served as program annotator for the Chicago Symphony Orchestra. He received his
tive analysis of the two songs because of his extensive experience with music analysis.108

The plaintiff’s claim was based on similarities of two music themes common to both works.109 The first theme, Theme A, consisted of eight measures; the second, Theme B, was four measures long. Before explaining his analysis, Parsons stated his conclusion: "My opinion is that the two songs had such striking similarities that they could not have been written independent of one another. . . . I would say I don’t see how ['How Deep Is Your Love'] could have been composed independent of 'Let It End.'"110 After describing to the jury the process of musical notation,111 Parsons began his analysis.

Parsons focused on the songs’ similarities of pitch and rhythm for each of the common themes.112 For each theme, using Mylar overlays,113 Parsons first demonstrated the number of identical pitches with the same relative location within their measures, and then demonstrated the number of identical rhythmic impulses. Following each part of his analysis, recordings114 of the analyzed themes were played as Parsons physically pointed out the similarities on the music manuscript.115

Parsons testified that "of the 34 notes in the Selle Theme A or first eight bars and 40 notes in the Gibb Theme A, or first eight bars,"116 "[t]here are 24 notes . . . in common, and in similarity [sic] symmetrical

B.A. in music from Columbia University and held master's degrees in education and composition. Parson's extensive music studies had covered harmony, counterpoint, form, analysis, orchestration, fugue and composition. See Record at 187-98. These credentials are impressive but not atypical. In a recent plagiarism case, the chairman of the Juilliard School music theory department testified on behalf of Rolling Stone Mick Jagger. See Gannett Westchester Newspapers, Apr. 21, 1988, at 15, col. 3.

108. Record at 198. Note the following excerpt, however:

Q: Prior to your involvement in this case, have you ever made a comparative analysis of two popular songs?

A: No.

Id. The defendants seized on this admission, both during cross-examination, see Record at 266-67, 288-90, and on appeal, see Selle v. Gibb, 741 F.2d 896, 904 (7th Cir. 1984).

109. The claim was based on music alone; the lyrics of the two songs were completely different. See Record at 203.

110. Id. at 202.

111. See id. at 205-18.

112. Parsons' purpose was "[t]o compare the melodies to see what similarities existed between the two compositions." Id. at 199.

113. These overlays indicated and numbered the similarities using red arrows and numerals. Musical "ties" were identified in turquoise. In short, the demonstration was elaborate. See id. at 222-23, 226-27, 232-34.

114. The faithfulness of the recordings to the copyrighted versions of the songs was a hotly contested issue at trial. The recordings used in Parsons' demonstration had been made at plaintiff's request, and in anticipation of trial. Defendants questioned whether the renditions were accurate, whether the copyrighted versions had been used in making the recordings, and whether it was appropriate to use instruments not called for specifically by the copyrighted version of the song. See, e.g., id. at 256-58, 262-63, 323-27.

115. See, e.g., id. at 230.

116. Id.
positions."  Of the thirty-five rhythmic impulses in the Selle composition and the forty rhythmic impulses in the Gibb composition, Parsons found that thirty were identical. Parsons concluded that "the similarities are so great, the similarities are so vivid and striking that they would preclude independent composition." After a similar analysis of the B themes, Parsons reached the same conclusion. Next, Parsons noted that each theme appeared in the same parts of each song, and that this supported his conclusion. Finally, Parsons testified that he knew of no "two musical compositions by two different composers that contain as many striking similarities as exist between [these two songs]."

On cross-examination, defendants attacked Parsons' testimony on many levels. First, defense counsel sought to demonstrate that Parsons' analysis had relied improperly on printed versions of the Bee Gees's song. Second, defense counsel focused on Parsons' inexperience with popular music analysis, and, specifically, his failure to familiarize himself with other Bee Gees works before reaching his conclusion. Next, by pointing out the sequential nature of Theme A—that Theme A was really two measures developed by a sequential repetition, defense counsel sought to minimize the significance that Parsons had given the Theme A eight-bar similarity. Defense counsel continued to question critically the relevance of other similarities Parsons had noted in his direct testimony. The cross-examination then sought to expose alterations in the

117. Id.
118. See id. at 236.
119. Id. at 237.
120. See id. at 248.
121. See id. at 249-50.
122. Id. at 250.
123. See id. at 256-58. This was especially important because the Bee Gees could not read or notate music, and, therefore, the defense counsel asserted, the comparison should have been based on a work tape the Bee Gees had recorded in France. See id. at 346-47.
124. See, e.g., id. at 266-67, 289-90.
125. See id. at 268-72.
126. See id. at 292-98.
127. For example, defense counsel cast doubt on the significance of the noted rhythmic similarities as follows:

Q: Would you say that the rhythm in this case, the rhythm pattern, was a common pattern?

Not unusual. Something that is found in many songs—well, not many—found in other songs?

A: I couldn't answer to that without making shall we say extensive comparisons of the rhythmic elements of those four eight bars... two [sic] infinite numbers of songs, to find out if indeed it is common to, similar to other songs in the exact way that it appears there, in the, the point of comparison, you see.

Q: You haven't done that?
A: I have not, no... .

Q: You didn't think that was important to a determination of whether there was any significance to the rhythm being duplicated in the two songs, at least to the extent you claim it has been?
songs as they were recorded in anticipation of trial.128

Following a brief redirect examination,129 Parsons was questioned about two points not raised by either counsel. First, after noting that Parsons' analysis was based on twelve allegedly strikingly similar measures,130 the court inquired as to the total length of each song.131 Parsons testified that the Selle and Gibb songs consisted of thirty-two bars and twenty-six bars, respectively.132 Second, the court questioned Parsons about his use of the term "striking similarity"; that is, whether the term is used in music analysis and whether Parsons knew of its legal implications.133 Parsons answered that, before analyzing the two songs, he had been unaware of the legal implications of the term, but his testimony was unclear about whether the term is used in the context of music analysis.134

The dissection testimony thus sought to show striking similarity and thereby establish the element of access. At no time did the expert testify about the substantiality of the alleged appropriation, except, perhaps, indirectly, when the judge inquired as to the length of the songs after he had first noted the length of the themes that were the subject of the dissection.135

B. Instructions to the Jury

The jury instructions in Gibb,136 however, did not expressly articulate the fundamental Arnstein distinctions. For example, the jury was not instructed to disregard the expert's dissection when considering the substantiality of the similarities.137 Nor did the court delineate the two steps of Arnstein: "Infringement requires proof of originality in plaintiff's work and copying by defendant composers[,] showing that, one, the defendants had access to the work, and two, that the defendants' work is substantially similar to the plaintiff's."138 Moreover, the court either injected the lay observer test into the issue of copying, or melded the elements of copying and improper appropriation:

A: My assignment was to compare these two songs in question and that is what I did.

Id. at 308-09.
128. See, e.g., id. at 329-31, 339.
129. See id. at 351-52.
130. See id. at 353.
131. See id.
132. See id. at 354.
133. See id. at 354-55.
134. See id. at 355.
135. See id. at 353.
136. See id. at 1064-83.
137. The instructions to the jury do not distinguish the similarities evidencing copying from the substantial similarity from which "the average person would recognize 'How Deep Is Your Love' as having been appropriated from parts of 'Let It End.'" See id. at 1079.
138. Id. at 1074-75.
If you find that the defendants had access to plaintiff's song so that they were able to copy it, then plaintiff must also establish a substantial similarity in the two works . . . .

To prove substantial similarity plaintiff must establish . . . that the average person would recognize [defendant's song] as having been appropriated from parts of [plaintiff's song] . . . .

However imprecise the jury instructions, Gibb provides a clear demonstration of the role of music expert testimony as developed in Arnstein.

C. The Shortcomings of Arnstein

Despite the fact that the Arnstein principles have endured for forty years, Arnstein has had its detractors. Many have focused on Arnstein's average lay observer test and the expert testimony limitation. Against the former, Professor Nimmer has argued that copyright is intended "to protect writers from the theft of the fruits of their labor, not to protect against the general public's 'spontaneous and immediate' impression that the fruits have been stolen." In addition, the analogy to the "reasonable man under the circumstances" in negligence law is not sound; the "average lay hearer" standard is not a standard by which the factfinder measures the defendant's conduct. Rather, it is a standard by which the factfinder determines the response of an "average lay hearer," presumably someone other than the defendant, to the similarities of the two works. Furthermore, an average lay hearer may not be qualified to determine the responses of the particular audience for whom the music has been composed. If, as Arnstein suggested, copyright law should protect the plaintiff's interest in potential financial returns, the ultimate result of the case may be in doubt.

139. Id. at 1079.
140. This test is frequently referred to as "the audience test." See, e.g., Nimmer supra note 8, § 13.03[E], at 13-47 (1988); Metzger, Name That Tune: A Proposal for an Intrinsic Test of Musical Plagiarism, 34 Copyright L. Symp. (ASCAP) 139, 171 (1987).
141. Nimmer, supra note 8, at § 13.03[E], at 13-49 (footnote omitted) (emphasis in original). Judge Clark lodged a similar complaint in his Arnstein dissent. See supra text accompanying notes 55-56; supra note 58.
142. See Nimmer, supra note 8, § 13.03[E], at 13-49 to -50; supra note 44.
143. See id., § 13.03[E], at 13-50.
144. See supra text accompanying notes 41-42.
145. See Note, Copyright Infringement Actions: The Proper Role for Audience Reactions in Determining Substantial Similarity, 54 S. Cal. L. Rev. 385 (1981) (questioning value of lay observer test when copyrighted matter is targeted for a particular, identified audience).
146. See supra text accompanying notes 40-41.
147. Federal copyright law "is intended [in part] to motivate the creative activity of authors and inventors by the provision of a special reward." Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 429 (1984); see 1 M. Nimmer & D. Nimmer, Nimmer on Copyright § 1.03[A], at 1-31 to 1-32 (1988). Accordingly, "the immediate effect of [federal] copyright law is to secure a fair return for an 'author's' creative labor." Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); cf. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566-68 (1985) (noting that the availability of a "fair use" defense is largely dependent upon the effect of the alleged infringer's use on the potential market for the complaining work).
mate test for infringement should consider specifically the response of the market from which those returns would derive.\textsuperscript{148} Finally, the "lay-hearer test" may promote findings of infringement based on overall similarities which, in fact, may be attributable, not to copying, but to common sources\textsuperscript{149} or genuine coincidence,\textsuperscript{150} and conversely, as Professor Nimmer has suggested, under the lay hearer test, "very real appropriation" may go undetected.\textsuperscript{151}

The Arnstein limitation on expert testimony also has inspired criticism.\textsuperscript{152} A frequent criticism notes that:

[T]he distinction between the two parts of the Arnstein test may be of doubtful value when the finder of fact is the same person for each step: that person has been exposed to expert evidence in the first step, yet she or he is supposed to ignore or "forget" that evidence in analyzing the problem under the second step. Especially in complex cases, we doubt that the "forgetting" can be effective when the expert testimony is essential to even the most fundamental understanding of the objects in question.\textsuperscript{153}

In other words, the limitation of Arnstein is more theoretical than practical.\textsuperscript{154}

More importantly, however, adherence to Arnstein's exclusion of ex-

\textsuperscript{148} See Nimmer, supra note 8, at § 13.03[E], at 13-48 n.93 ("If the works in issue are directed to a particular audience, then the 'spontaneous and immediate' reaction of that audience is determinative. Thus, if the 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 imaginations of young people,' who may not be as bent as their elders upon "'detecting disparities.'"'" (quoting Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1166 (9th Cir. 1977) (quoting Ideal Toy Corp. v. Fab-Lu, Ltd., 261 F. Supp. 238, 241 (S.D.N.Y. 1966))).

\textsuperscript{149} See Rizzi v. Robbins Music Corp., 58 U.S.P.Q. 315 (S.D.N.Y. 1943) (similarity between plaintiff's and defendant's songs probably resulted from common source rather than defendant copying from plaintiff because there was no evidence of access and defendant testified that he patterned his song after Wagnerian theme); see also Selle v. Gibb, 741 F.2d 896, 905 (7th Cir. 1984) (noting that similarities may have been attributable to common source); MCA, Inc. v. Wilson, 425 F. Supp. 443, 451-52 (S.D.N.Y. 1976) (court examined similarities to determine whether attributable to use of common musical forms or elements and, therefore, non-infringing), aff'd and modified on other grounds, 677 F.2d 180 (2d Cir. 1981).

\textsuperscript{150} A finding of copyright infringement cannot properly be based upon similarities that result from genuine coincidence. See Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936) (L. Hand, J.) ("[I]f 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.'"), cert. denied, 298 U.S. 669 (1936).

\textsuperscript{151} See Nimmer, supra note 8, at § 13.03[E], at 13-52.

\textsuperscript{152} See, e.g., Whelan Assocs., Inc. v. Jaslow Dental Laboratory, Inc., 797 F.2d 1222, 1232-33 (3d Cir. 1986) (action for infringement of computer programs), cert. denied, 479 U.S. 1031 (1987); cf. Spectravest, Inc. v. Mervyn's Inc., 673 F. Supp. 1486, 1492 (N.D. Cal. 1987) (Because "[r]easonable minds often differ as to the 'total concept and feel' of complex artworks" such as songs and movies, "[w]hat must be weighed in these cases are subtle, nuanced, interrelationship [sic] of many components.").

\textsuperscript{153} Whelan, 797 F.2d at 1232-33.

\textsuperscript{154} See, e.g., supra notes 136-39 and accompanying text.
pert dissection and analysis on the issue of improper appropriation precludes a meaningful evaluation of the quality\(^\text{155}\) and quantity of similarities by the factfinder. Once copying is established, the factfinder must determine the issue of "improper appropriation" by focusing on similarities that relate to copyrightable material, and discounting those which are the result of common source or common musical form rather than copying.\(^\text{156}\) Without the benefit of expert analysis and dissection, the factfinder is ill-equipped to distinguish these two types of similarities. Consequently, the unguided, possibly "incompetent"\(^\text{157}\) ears of the factfinder may perceive as qualitatively important similarities that are not the result of copying.

In addition, the Arnstein limitation deprives the factfinder of information that may help the factfinder more easily hear the works at issue through the ears of the "audience for whom such popular music is composed."\(^\text{158}\) By noting similarities dictated by the particular type of musical works at issue, expert dissection and analysis provide the factfinder with guidance as to the response of the targeted audience; similarities dictated by form or type of work are most likely insignificant to the ears of the targeted audience familiar with that form or type of work. In short, expert dissection and analysis are relevant\(^\text{159}\) to the improper appropriation determination, and, accordingly, the jury should be encouraged to consider them on this issue. Although abuse of expert dissection and analysis\(^\text{160}\) may make it difficult for the factfinder "to see the forest for the trees,"\(^\text{161}\) this danger is substantially outweighed by the benefits of the increased guidance\(^\text{162}\) with which the factfinder will make

\(^{155}\) "Even if a copied portion be relatively small in proportion to the entire work, if qualitatively important, the finder of fact may properly find substantial similarity." Baxter v. MCA, Inc., 812 F.2d 421 (9th Cir.), cert. denied, 108 S. Ct. 346 (1987); see, e.g., Fred Fisher, Inc. v. Dillingham, 298 F. 145 (S.D.N.Y. 1924) (similarity of an eight note "ostinato" sufficient to establish infringement).


\(^{157}\) See supra note 55, 56 and accompanying text.

\(^{158}\) See Arnstein v. Porter, 154 F.2d 464, 472 (2d Cir. 1946); supra note 148 and accompanying text.

\(^{159}\) Note, however, that in Arnstein v. Porter, the court justified the exclusion of expert dissection and analysis on irrelevancy grounds. See supra note 38.

\(^{160}\) See supra note 54 and accompanying text.

\(^{161}\) Frankel v. Irwin, 34 F.2d 142, 144 (S.D.N.Y. 1918) (infringement of literary work cannot be established by labored analyses).

\(^{162}\) This objective—to provide the factfinder with more guidance—motivated the framers of the Federal Rules of Evidence to abolish the "ultimate issue rule," see Fed. R. Evid. 704 advisory committee's note, which disallowed opinion testimony on ultimate issues. See McCormick on Evidence § 12, at 30-32 (E. Cleary 3d ed. 1984). Rule 704 abolished the "unduly restrictive" ultimate issue rule, in part because it "generally served only to deprive the trier of fact of useful information." See Fed. R. Evid. 704 advisory committee's note. Additionally, the ultimate issue rule, like the Arnstein limitation on expert testimony, had been criticized for being "difficult of application." See id.
the ultimate infringement determination.¹⁶³

CONCLUSION

The idea-expression analysis of Krofft is particularly unsuited to music as the subject matter of copyright. The Arnstein principles, though imperfect, provide a more workable analysis for determining music copyright infringement. The difficulties in applying the Arnstein standards could be resolved by permitting consideration of expert analysis and dissection on the ultimate issue of improper appropriation. If experts are permitted to testify as to the relative importance of the similarities, juries will less likely attach undue significance to similarities of the works that the lay hearer misperceives as substantial and unique to the two works at issue. As a matter of course, experts are heavily involved in music plagiarism litigation. Although the battle of experts may be intensified, the ultimate issue of infringement would be better informed and not decided wholly by unguided ears. In practice, this proposed change may be a mere formality. As the Arnstein dissent pointed out over forty years ago, a jury cannot be expected to distinguish the issues and the evidence in accordance with the Arnstein formulation.

Michael Der Manuelian

Although Rule 704, enacted long after Arnstein was decided in 1946, does not per se abolish Arnstein's limitation on the use of expert testimony, it does cast suspicion upon the validity of the policies underlying the limitation.¹⁶³ Notably, even the Arnstein court failed to entirely eliminate the expert's testimony from the jury's consideration on the ultimate issue of improper appropriation. See supra note 38.