Musical Expertise and the “Ordinary” Listener in Federal Copyright Law

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Abstract

A perennial problem in federal copyright law has been how, and by whom, musical similarity should be evaluated. Since the first copyright infringement lawsuits heard in the mid-nineteenth century, courts have relied consistently on the detailed comparisons produced by expert witnesses. But since the pivotal 1945 decision in *Arnstein v. Porter*, trial courts have limited the contributions of experts and instead relied on the totalizing perceptions of non-experts to determine the outcome of each case. While the *Arnstein* judges’ reasoning seemed to offer a standardized legal process for finding infringement across all copyrightable media, the resulting “ordinary listener standard” for copyright infringement cases was rooted more idiomatically in contemporaneous notions of music appreciation and a lack of listening skill among the general public. Continued reliance on this legal “lay-expert divide” for decades has generated unpredictable and inconsistent results across cases. Subsequent courts seeking revisions have encountered a distinctly musicological question: what constitutes musical expertise?

This article applies an interdisciplinary approach, drawing from musicology and law, to begin mapping the historical terrain of musical expertise in federal copyright litigation. It traces the legal development of a “lay-expert divide” through judicial opinions, from its roots in early legal realism and the US music appreciation movement to more recent re-examinations that promise to account better for a diversity of listening skill and acuity. In so doing, it highlights shifting judicial notions of expertise and the impact they have had on the process of evaluating music copyright infringement.

A perennial problem in United States copyright law has been how, and by whom, musical similarity should be evaluated. Since the first music copyright infringement lawsuits heard in the mid-nineteenth century, courts have relied consistently on the detailed comparisons produced by expert witnesses.¹ But since the 1945 decision in the case of [Arnstein v. Porter](#), the last of five cases involving pugnacious composer-plaintiff Ira Arnstein, trial courts have limited the contributions of those expert witnesses and instead relied on the totalizing perceptions of non-experts, either jurors or the judges themselves, to determine the outcome of each case.² While the judges’ reasoning in the *Arnstein* case seemed to offer a uniform legal process for determining infringement that could apply to cases across copyrightable media, the resulting “ordinary observer” legal standard by which similarity would be evaluated was rooted more idiomatically in contemporaneous notions of music appreciation and an assumed lack of listening skill among the general public. Continued reliance on this legal divide between experts and non-experts for

¹ See generally Katherine Leo, “Blurred Lines: Musical Expertise in the History of American Copyright Litigation,” (PhD diss., The Ohio State University, 2016).

² Music copyright cases featured in this article will include hyperlinks to the judicial opinions and other resources, including recordings and sheet music, available on the Music Copyright Infringement Resource website, sponsored by the Columbia Law School and the USC Gould School of Law: <http://mcir.usc.edu/>.

decades has generated unpredictable and inconsistent results across infringement cases. Subsequent courts seeking to resolve these problems have continually encountered a distinctly musicological question: what constitutes musical expertise and what role should it play in the legal decision-making process?

This article applies an interdisciplinary approach that draws on musicology and law to begin mapping the historical terrain of musical expertise in federal copyright litigation. It traces the legal development of a “lay-expert divide” through judicial opinions as to the outcome of each case, from its roots in early legal realism and the US music appreciation movement, notably located in opinions written or influenced by Judge Learned Hand, to more recent re-examinations of musical skill among non-expert listeners. In so doing, it sheds light on shifting judicial notions of listener skill and the impact that such conceptions of expertise have had on the process for evaluating music copyright infringement.

Early Divisions: Learned Hand and the “Untrained Ear”

Since the earliest copyright infringement cases heard in the United States, judges have sought to devise legal strategies intended to produce consistent, equitable results across cases and copyrightable media, from books and maps to music.³ Drawing their inspiration from previously-decided lawsuits involving books, mid-nineteenth-century courts extended the legal principle of similarity to music cases, which were evaluated according to a substantiality standard applied to the facts of each case as the “basis for judicial inquiry.”⁴ Thus, if there was sufficient evidence of similarity between the copyrightable works at issue, then a defendant would be liable for infringement. Judges presiding over music copyright lawsuits in particular discovered that this inquiry was highly fact-specific and fraught with complexity. To make their decisions, they turned to analyses produced by musical experts, ranging from band leaders and publishing company clerks to music teachers. These expert contributions often significantly influenced the outcome of each case, usually by offering a close, note-by-note comparison between pieces of published sheet music.⁵

By the turn of the twentieth century, concerns about the functionality of judicial opinions to later copyright cases motivated judges to refine the similarity inquiry in ways that emphasized fact-driven, and seemingly objective, methods of legal analysis.⁶ Beyond determining quantitative and qualitative thresholds for infringement, cases involving music often hinged on legal questions regarding the

³ Music copyright cases had been heard since 1844, soon after Congress legislatively extended the reach of federal copyright law to include “musical compositions,” alongside other expressive works, which occurred in 1831. An Act to Amend the Several Acts Respecting Copyrights, H.R. 145 (1831) (amended 1870).

⁴ See *Emerson v. Davies*, 8 F. Cas. 615, 622 (C.C.D. Mass. 1845) (“resemblances in those parts and pages are so close, so full, so uniform and striking, as fairly to lead to the conclusion that the one is a substantial copy of the other, or mainly borrowed from it. In short, that there is a substantial identity between them”). For music, see, e.g., *Jollie v. Jaques*, 13 F. Cas. 910 (C.C.S.D.N.Y. 1850) (evaluating competing arrangements of German polka song).

⁵ These witnesses were determined legally to be “acquainted with music practically and theoretically.” Record Group 21; Record Entry NY-213; National Archives ID 749265; Circuit Court Southern District of New York; Equity Case Files 1846–1877, Box #5; “*Jollie v. Jaques*,” Dibble Deposition, 1; see also *Blume v. Spear*, 30 F. 628 (C.C.S.D.N.Y. 1878).

⁶ Legal formalism was the dominant jurisprudence in the late nineteenth century, which was predicated on a judicial application of laws as empirical principles. See Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: Clarendon Press, 1995), 9–11; Laura Kalman, *Legal Realism at Yale* (Chapel Hill: University of North Carolina Press, 1986), 3–11. Legal realism as it rose in the 1920s and 1930s was predicated on a drive to create a systematic, reliable way to predict the outcome of legal questions. Proponents drew greater influence from judicial ‘hunches’ and motivations on the application of relevant law. See Gary Aichele, *Legal Realism and Twentieth Century American Jurisprudence* (New York: Garland Pub., 1990), 58.

individuals best-equipped to conduct such evaluations.⁷ Federal judges presiding over such cases, especially serving the Southern District of New York and its appellate court, the Second Circuit, whose jurisdiction extended over much of the music industry in New York City, attempted to reconcile competing factors. On the one hand, the economic policy at the core of US copyright law, namely, the protection of artists’ market control over their creations, encouraged consideration and privileging of so-called “average” or “ordinary” consumer perceptions.⁸ On the other hand, a burgeoning music-appreciation movement across the country, emerging hand-in-hand with institutions and pedagogies of “classical” music nationwide, encouraged a contrary argument; namely, that “the processes of music are so subtle and the meaning is so indefinite as compared to that of the other arts,”⁹ that some kind of musical training would be necessary for a full comprehension of music—one that, over time, a growing population of listeners was supposed to achieve. But judges were skeptical of the highly-detailed, and often partisan, analyses proffered by experts hired by either party in a lawsuit—analyses which the judges themselves could only partly understand. They questioned whether, and how, such sophisticated analyses should be brought into play, given that non-expert listeners might lack the musical acuity to interpret them.

These questions fueled then-federal district Judge Learned Hand’s early music copyright opinions, which offer a glimpse at a nascent legal distinction between categories of listeners based on the Judge’s own ideas about musical training. Although the extent of Judge L. Hand’s musical knowledge remains undetermined, “music meant a great deal” to him.¹⁰ The Judge was known to be an avocational performer,¹¹ and his opinions align with the contemporaneous music appreciation movement,¹² especially the allegedly increasing divide between trained musicians and so-called “average” listeners believed to be unable to engage in “true listening.”¹³ Judge L. Hand’s opinions reflect his realist jurisprudence, including

⁷ See, e.g., *Christie v. Harris*, 47 F.Supp. 39 (S.D.N.Y. 1942); *Shipman v. R.K.O. Radio Pictures, Inc.*, 100 F.2d 533 (2d Cir. 1938); *Wren v. Shubert Theatre Corp.*, 5 F.Supp. 258 (S.D.N.Y. 1933). But see *Twentieth Century Fox Film Corp. v. Stonesifer*, 140 F.2d 579 (9th Cir. 1944) (evaluating stage play according to average reasonable reader and spectator standard); *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1 (9th Cir. 1933) (evaluating stage play based on an average person standard).

⁸ For a discussion of the economic policy underpinnings of copyright see, e.g., William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property Law* (Cambridge: Belknap Press of Harvard University, 2003), 37–54 (discussing an informal model for copyright that highlights economic issues); Jeffrey L. Harrison and Jules Theeuwes, *Law and Economics* (St. Paul: West, 2008), 140 (describing the economic roots of copyright).

⁹ Clarence G. Hamilton, *Music Appreciation: Based upon Methods of Literary Criticism* (New York: Oliver Ditson, 1920), 9.

¹⁰ Gerald Gunther, *Learned Hand: The Man and the Judge* (Oxford: Oxford University, 2011), 37, 269–71. L. Hand has been said to have particularly enjoyed writing copyright decisions involving music, undoubtedly in part because of his interest in musical creativity and in part due to the “intellectual challenges” that such cases presented.

¹¹ L. Hand produced two recordings for the Archive of American Folk Song at the Library of Congress during a visit to Washington, D.C., in 1942. See “Judge Learned Hand Turns Singer in New U.S. Album of Folk Music,” *New York Times* (May 11, 1953): 1, 15; Ross E. Davies, “Learned Hand Sings, Part One: Liner Notes for ‘Songs of His Youth’,” *Green Bag* 16 (2013): 257–80. <https://doi.org/10.2139/ssrn.2271070>. For the recording, see Judge Learned Hand Recordings (AFC 1945/007), Archive of Folk Culture, American Folklife Center, Library of Congress, Washington, DC; Learned Hand, *Songs of His Youth* (GBRC 2013-1).

¹² Texts intended for general audiences that address what authors considered fundamental musical knowledge proliferate in the early twentieth century. Stewart Macpherson identifies “for want of a better term, [what] has been called the Appreciation movement both [in France, referring to E. Jaques-Dalcroze] and in America,” the “inauguration” for which Macpherson isolated to 1908. See Stewart Macpherson, *The Appreciation, or Listening, Class* (London: Joseph Williams Limited, 1936), 1–3.

¹³ Stewart Macpherson, *Music and Its Appreciation or The Foundations of True Listening* (London: Joseph Williams, 1910), 4 (outlining “points necessary in true listening” that only musically trained listeners could address, including the “nature of the composition,” instrumentations, date, melodic identification, development, form, and harmony).

suspicion toward the academic rigor of evidence and testimony introduced by expert witnesses, which he found to be as obfuscating and partial as they could be informative.¹⁴

Judge L. Hand's discussion in these cases, notably in *Hein v. Harris*,¹⁵ referred to the "trained ear," drawing what would become a significant distinction between kinds of listeners based on his assumptions regarding musical skill. *Hein* involved the musical theater composers of *The Boys and Betty*, who claimed that the chorus from "Maria Cahill's Arab Love Song" was misappropriated by a later song, "I Think I Hear a Woodpecker Knocking at My Family Tree," in *The Golden Girl*.¹⁶ In his deciding opinion, Judge L. Hand noted similarities and differences between songs that would not necessarily be perceptible without musical training. "If the choruses be transposed into the same key and played in the same time, their similarities become at once apparent. In certain of the bars, *only a trained ear can distinguish them*, and their form and rhythm is quite the same."¹⁷ The Judge suggested that the perception of similarity for copyright purposes depended on musical skill, or a lack thereof: "when [some of the melodies at issue] are played in succession *it would take the ear of a person skilled in music to distinguish between them*."¹⁸ Instead, the Judge reasoned that "only when the similarity is substantially a copy, *so that to the ear of the average person* the two melodies sound to be the same,"¹⁹ would there be copyright infringement. According to the Judge, similarity was to be evaluated based the assumed judgment of an average listener.

The model for such an "average" listener in *Hein* is reminiscent of the average or ordinary "reasonable person," a legal fiction predicated on notions of an ideal representative of the lowest common denominator within a diversity of individuals impacted by a law, or simply how "most people" might think or behave.²⁰ This concept continues to be applied as a standard against which judges would compare a defendant's behavior to distinguish between lawful and unlawful activities. Although legally-binding definitions of what average musical training entailed are absent from the *Hein* opinion, Judge L. Hand created a correlation between "untrained" and "average" as distinguishable from "musically-skilled." His discourse established that musical skill separated groups of listeners and favored the comparisons of so-called average listeners over those of musical experts in the courtroom. To make his decision for the purposes of *Hein*, however, Judge L. Hand relied on his own evaluation of similarity, as perhaps a self-identified average listener, or at least a skeptic of all witness testimony, to reach his finding of infringement.

Ira Arnstein's Days in Court

By the mid-1940s, the Southern District of New York, the Second Circuit, and specifically Judge L. Hand, had had decades to interpret the copyright similarity standard and to settle on a consideration of the persons best suited to conduct comparisons. The court was poised to set new precedent when it began receiving infringement complaints filed by Ira Arnstein. The New York-based musician's career trajectory

¹⁴ Learned Hand, "Historical and Practical Considerations Regarding Expert Testimony," *Harvard Law Review* 15 (May 1901): 40–58, 52. <https://doi.org/10.2307/1322532>.

¹⁵ *Hein v. Harris*, 175 F.875 (C.C.S.D.N.Y. 1910), aff'd 183 Fed. 107 (2d Cir. 1923).

¹⁶ *Hein*, 175 F. at 875.

¹⁷ *Hein*, 175 F. at 875 (emphasis added).

¹⁸ *Hein*, 175 F. at 875 (emphasis added).

¹⁹ *Hein*, 175 F. at 875 (emphasis added).

²⁰ Literature and judicial contemplations on the reasonable person standard are vast. For a discussion of the reasonable person standard as applied to copyright, see, e.g., Irina D. Manta, "Reasonable Copyright," *Boston College Law Review* 53 (September 2012): 1303–60.

was unusual, as he garnered greater fame for being a belligerent litigant than a composer. His lawsuits against more notable Tin Pan Alley composers and publishers constitute a collection of at least five separate lawsuits, in which over fifty defendants and over sixty songs were named under nearly the same complaint: that his music was stolen by another, usually more successful, composer. Over the course of his trials, Arnstein became known for outlandish demonstrations in the courtroom, as well as antics that pushed the boundaries of legal etiquette as well as the boundaries of admissibly truthful and unbiased evidence.²¹ When considered together, the legal impact of Arnstein cases challenged courts to consider the nature of musical expertise and the kinds of analyses that should, rather than could, be produced as evidence of alleged misappropriation.

By the time of his second lawsuit, which was filed against publisher [Edward B. Marks](#), Arnstein had already encountered now-appellate Judge L. Hand and his propensity to consider musical analyses in the context of an untrained ear.²² As would become a theme for Arnstein’s lawsuits, his claims would be found unsuccessful, but the lawsuit provided an opportunity for the court to continue considering the contours of similarity analysis and the individuals best-suited to evaluate it. In the third case, [Arnstein v. Broadcast Music, Inc.](#) (BMI), Arnstein had alleged infringement of eight separate songs whose copyright was assigned to BMI by their composers.²³ Although the court rendered Arnstein’s complaints in *BMI* ultimately unsuccessful, appellate Judge Augustus Hand (Learned’s cousin) reconsidered the legal process by which similarity should be determined.²⁴ In his decision, Judge A. Hand noted that “similarities between these songs cannot be readily detected by the lay ear, nor by the effect of the composition as a whole. . . [they] can only be discovered by what [fellow] Judge Hough aptly called ‘dissection.’”²⁵ In this context, dissection referred to the kinds of comparative analyses usually conducted only by musical experts. Like his cousin, Judge A. Hand challenged the application of such “[t]echnical analysis,” finding it to be “not the proper approach to a solution; it must be more ingenuous, more like that of a spectator, who would rely upon the complex of his impressions,”²⁶ to decide if the songs at issue were similar enough to constitute infringement. Judge A. Hand thus offered clarification for the extent of musical skill or training possessed by a non-expert and framed what would become the foundational question for the legal similarity inquiry: whether infringement should be based on a totalizing, synthesizing, intuitive, or impressionistic perception of non-expert lay listeners that would be essentially untranslatable into exacting terms, or instead the detailed comparisons conducted by expert witnesses, which depend on the precise application of technical concepts and terminology. Although the question was raised in the context of music, the judges’ response would influence future lawsuits involving any copyrightable works, regardless of medium.

²¹ See Gary Rosen, *Unfair to Genius* (Oxford: Oxford, 2012), 127–36 (discussing *Arnstein v. Edward B. Marks Music Corp.*, 82 F.2d 275, 277 (2d Cir. 1936) (argument between Mauro-Cottone and Spaeth about “adding extra notes”); *Arnstein v. Twentieth Century Fox Film Corp.*, 3 F.R.D. 58 (S.D.N.Y. 1943) (Arnstein serving as his own expert witness, manipulating presentation of his song)). <https://doi.org/10.1093/acprof:osobl/9780199733484.001.0001>.

²² Learned Hand was appointed to the Second Circuit appellate bench in 1924. See *Arnstein v. Edward B. Marks Music Corp.*, 82 F.2d 275, 277 (2d Cir. 1936) (after discussing the formal structure of the introductory phrases, “when the two songs are played the phrases show no resemblance, at least to the *untrained ear*” (emphasis added)).

²³ *Arnstein v. Broadcast Music, Inc.*, 137 F.3d 410 (2d Cir. 1943) [hereinafter *BMI*]. Arnstein had submitted eleven songs to BMI, eight of which became the objects of the lawsuit.

²⁴ *BMI*, 137 F.3d at 412 (citing *Arnstein v. Edward B. Marks Music Corp.*, 82 F.2d 275, 275 (2d Cir. 1936)). For more information on the familial relationship between A. and L. Hand, see Jeffrey Brandon Morris, *Federal Justice in the Second Circuit: A History of the United States Courts in New York, Connecticut & Vermont* (New York: Second Circuit Historical Committee, 1987), 142.

²⁵ *BMI*, 137 F.3d at 412 (citing *Dymow v. Bolton*, 11 F.2d 690, 692 (2d Cir. 1926)).

²⁶ *BMI*, 137 F.3d at 412 (citing *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 123 (2d Cir. 1930)).

Through this decision, Judge A. Hand expressed a foundational question for the legal similarity inquiry that responded to a contemporaneous dialogue among his fellow judges. While this question may have seemed to turn on public policy regarding copyright, it was undoubtedly influenced by more specific notions regarding the purpose and value of musical analysis in a legal context. Although previous courts had relied heavily on the role of experts in this respect, Judge A. Hand drew significant attention to non-expert listener perceptions, which for him was to be juxtaposed against those of experts.

In the wake of Arnstein's cases against BMI and his subsequent lawsuit against Twentieth Century Fox,²⁷ other courts nationwide labored to establish the extent to which comparisons produced by experts and non-experts should influence the court's final decision. With little, if any, apparent citation to research on listening practices or musical training, a judicial dichotomy between the so-called "expert" and "average hearer"²⁸ nevertheless emerged. Judges, both in and beyond the Second Circuit, raised questions regarding the roles each group should play in the infringement inquiry.²⁹ Some courts continued to rely exclusively on the musical-theoretical analyses of expert witnesses, while others considered the perceptions of non-expert listeners as more indicative of the economic harm caused by alleged infringement, preferring instead to rely on such listeners for dispositive legal evaluations.

Concerns regarding musical similarity were not exclusive to Arnstein. In *Allen v. Walt Disney*, for example, plaintiff Thomas Allen, representing his eponymous publishing company, sued Walt Disney, claiming that a song he published in his *Intercollegiate Song Book, Eastern Edition*—"Old Eli," a song composed and performed at Yale University—was infringed by Frank Churchill's "Some Day My Prince Will Come" as it was heard in animated production of *Snow White and the Seven Dwarfs*.³⁰ In its decision favoring Walt Disney, the court discussed expert testimony at length, establishing that the evidence they presented was seemingly irreconcilable across parties and against non-expert musical perceptions.³¹ Although the court recounted the expert analyses of the sheet music in detail, it reinforced a distinction between "the ear of the musician and . . . the ear of the average person."³² To this end, the court also noted the extremely "intricate" nature of musical analysis and the importance of "average" aural perceptions of similarity.³³ Regardless of this difference, or inevitable confusion created by intricate expert analyses, the musical experts seemed to influence the court's decision most, with the court addressing "every salient point" presented by both parties, regardless of "sharp conflicts" between them.³⁴ Ultimately relying on his "own musical sense" like Judge L. Hand, however, the presiding judge found in favor of the defendant.

²⁷ *Arnstein v. Twentieth Century Fox Film Corp.*, 3 F.R.D. 58 (S.D.N.Y. 1943).

²⁸ These terms also appeared in contemporaneous music appreciation texts. See, e.g., Sigmund Spaeth, *Music is For Everybody* (New York: Sentinel Books, 1945), 7.

²⁹ See, e.g., *Carew v. R.K.O. Radio Pictures, Inc.*, 43 F. Supp. 199 (S.D. Cal. 1942); *Hirsch v. Paramount Pictures*, 17 F. Supp. 816 (S.D. Cal. 1937).

³⁰ *Allen v. Walt Disney*, 41 F. Supp. 134, 135 (S.D.N.Y. 1941).

³¹ *Walt Disney*, 41 F. Supp. at 138.

³² *Walt Disney*, 41 F. Supp. at 138.

³³ Later in its opinion, the court further reinforces this distinction by seeming to confuse tempo and meter: "[t]he same applies to the second, that is, the tempo. Complainant's composition was originally written in march time, while respondents' in waltz time." *Walt Disney*, 41 F. Supp. at 138.

³⁴ *Walt Disney*, 41 F. Supp. at 140.

Arnstein v. Porter

In 1945, Arnstein filed his final copyright infringement complaint against famed American songbook composer Cole Porter.³⁵ In *Arnstein v. Porter*, Arnstein claimed that several of his previously copyrighted songs had been infringed upon by some of Porter’s most commercially successful hits, including “Night and Day” and “Begin the Beguine.”³⁶ Matching each of Porter’s songs with one of his own, as shown in Table 1 below,³⁷ Arnstein strategically demanded a jury trial and damages of \$1 million from Porter in compensation for his accused violations. According to Arnstein, Porter’s commercial success was a result of “wholesale pirating”³⁸ of Arnstein’s music, with accusations as to Porter’s access to those songs. In his deposition, Arnstein alleged that Porter “‘had stooges right along to follow me, watch me, and live in the same apartment with me,’ and that [Arnstein’s] room had been ransacked on several occasions.”³⁹ In response, Porter did not deny Arnstein’s earlier copyright claims or the similarities between the claimed songs. Instead, he focused on his purported lack of access to Arnstein’s songs that would have precluded Porter’s ability to copy.⁴⁰ After a trial and appeal process that lived up to the reputation Arnstein had earned for “farcical” court appearances⁴¹, by late 1946, Porter had prevailed.

Cause of Action	Ira Arnstein’s Songs	Cole Porter’s Allegedly Infringing Songs
1	A Modern Messiah	Don’t Fence Me In
2	La Prière	I Love You
3	I Love You Madly La Prière	Night and Day
4	Song of David The Lord is My Shepard A Mother’s Prayer	Begin the Beguine
5(a)	Sadness Overwhelms My Soul	You’d Be So Nice to Come Home To
5(b)	Twilight Waltz	What Is This Thing Called Love
5(c)	A Mother’s Prayer	My Heart Belongs to Daddy

Table 1: Arnstein’s claims to songs allegedly infringed by Porter

³⁵ *Arnstein v. Porter*, 154 F.2d 464, 467 (2d Cir. 1946) [hereinafter *Arnstein*].

³⁶ *Arnstein*, 154 F.2d at 467; see also Gary Rosen, *Unfair to Genius* (Oxford: Oxford, 2012), 218–19. In addition to claiming infringement as to the music and lyrics, Arnstein alleged that Porter had also infringed “only as to title.” Records Group 21; National Archives and Records Administration Kansas City; USDC Southern District of New York; Equity Case Files Box 5977; “Arnstein v. Porter,” Defendant’s Appellate Brief, ii.

³⁷ *Arnstein*, 154 F.2d at 467. In addition to claiming infringement as to the music and lyrics, Arnstein alleged that Porter had also infringed “only as to title.” Records Group 21; National Archives and Records Administration Kansas City; USDC Southern District of New York; Equity Case Files Box 5977; “Arnstein v. Porter,” Defendant’s Appellate Brief, ii.

³⁸ Records Group 21; National Archives and Records Administration Kansas City; USDC Southern District of New York; Equity Case Files Box 5977; “Arnstein v. Porter,” Complaint, 62–63.

³⁹ *Arnstein*, 154 F.2d at 467.

⁴⁰ *Arnstein*, 154 F.2d at 467. Access, or the defendant’s ability to obtain copies of the plaintiff’s copyrighted work, was another point of discussion in early twentieth-century copyright cases that played out alongside matters of similarity.

⁴¹ See Rosen, *Unfair to Genius*, 231.

At trial, both parties called experts to comment on musical similarity and their understanding of non-expert perceptions regarding any similarity,⁴² as well as whether that similarity might evince copying.⁴³ Experts presented a dynamic discussion of musical composition and analysis, aided by visual charts placed on an easel for all present to view,⁴⁴ verbal explanations of music theory and composition, and aural demonstrations of phrases and themes from the songs at issue.

Despite lively examinations at trial that addressed the contours of musical-legal similarity analysis, presiding district court Judge Caffey summarily dismissed the case. He instead relied on Arnstein's litigious reputation and his own common sense to present an opinion that outlined the issues and forms of relief, and thereby determined:⁴⁵

If time were available, I would deal with all the phases concerning each kind of relief sought. But my work growing out of the recent motion term is too pressing and voluminous to permit me to go further now. I have gathered all the files in five cases tried in this court wherein plaintiff sued for judgment in an action relating to music or copyrights on musical compositions. The size of the files warns me that several weeks would be needed in order to go through all the details. I feel bound to go to other cases in which decisions have been reserved.

The Judge thus dispensed with assessing musical similarity by any means to dispose of the case swiftly.⁴⁶ Instead, in a legal gesture that would bring about change to similarity analysis, Judge Caffey granted summary judgement in favor of Porter to dismiss the action.

On appeal, the Second Circuit remanded Judge Caffey's decision on the grounds of improper decision-making. The issue before the three-judge panel, consisting of Judges Frank, L. Hand, and Clark, was whether there was the "slightest doubt" as to the facts applied by the district court in its opinion, which legally framed the appeal around questions of fact rather than questions of law.⁴⁷ This emphasis on factual inquiries—for example, whether there was similarity between pairs of songs—coupled with the court's skepticism toward expert witnesses and disapproval of Judge Caffey's seemingly biased decision against Arnstein and his legal reputation, drove both the majority and dissenting opinions.

Writing for the Majority,⁴⁸ Judge Frank, with Judge L. Hand in concurrence, remanded the case. The Majority opinion defined a functional process for deciding infringement, intended for application by the district court that was based on separate, yet seemingly redundant, evaluations of similarity conducted first by experts and then non-experts.⁴⁹ According to this new legal test, future courts would follow a two-step process, moving from an inquiry regarding the valid registration of copyright-protected material to an

⁴² Records Group 21; National Archives and Records Administration Kansas City; USDC Southern District of New York; Equity Case Files Box 5977; "Arnstein v. Porter," Trial Transcript, 12, 18 (Baldwin); Transcript, 2 (Taylor). For an extended discussion of expert examinations at trial, see Leo, "Blurred Lines," 115–23.

⁴³ *Arnstein* Transcript, 79 (Baldwin).

⁴⁴ Extant records do not distinguish what the board was, nor do they describe specifically how the charts were arranged. These charts are not included in the court records. This same board is also referred to as an "easel." *Arnstein* Transcript, 81 (Baldwin).

⁴⁵ *Arnstein v. Porter*, 1945 WL 6897 (S.D.N.Y. 1945). Defendant's brief on appeal cited precedent justifying this decision on grounds of one party being "vexatious." See *Arnstein* Defendant's Appellate Brief, 23–29.

⁴⁶ See also Shyamkrishna Balganes, "The Questionable Origins of Copyright Infringement Analysis," *Stanford Law Review* 68 (April 2016): 791–862, 801–03.

⁴⁷ See Balganes, "The Questionable Origins," 804 ("The effect of this framing is crucial to appreciate, since it indelibly merged the factual and legal issues involved in the case").

⁴⁸ Judge L. Hand joined the Majority but deliberately did not write the opinion, despite of, or perhaps because of, his previous experience with Arnstein and interest in copyright law. See Gunther, *Learned Hand*, 269.

⁴⁹ *Arnstein v. Porter*, 154 F.2d 465, 468 (2d Cir. 1946).

inquiry regarding alleged improper appropriation of that material. The first step has proven to be relatively straightforward; it is the second step where listening skill begins to matter. To prove improper appropriation, a plaintiff must present either direct evidence, usually through the defendant’s admission, or circumstantial evidence, usually involving access to the allegedly copied material by the alleged infringer, plus evidence of copying-in-fact based on the close comparison made by experts. Only where there is reasonable evidence of copying can the second step be resolved, that is, to evaluate whether the copying was sufficient to be considered improper appropriation or infringement.⁵⁰ This determination, which turned on witness credibility and lay perceptions, would henceforth be the province of the jury, rather than that of experts or judges.⁵¹

The legal disaggregation of what had simply been “similarity” into distinct notions of “copying” and “improper appropriation” had the effect of reinforcing a legal division between experts and non-experts or ordinary observers, each serving a different function:⁵²

analysis (‘dissection’) is relevant, and the testimony of experts may be received to aid the trier of the facts. If evidence of access is absent, the similarities must be so striking as to preclude the possibility that plaintiff and defendant independently arrived at the same result. If copying is established, then only does there arise the second issue, that of illicit copying (unlawful appropriation). On that issue . . . the test is the response of the ordinary lay hearer; accordingly, on that issue, ‘dissection’ and expert testimony are irrelevant.

Here, the court established that expert witnesses could only contribute their detailed analyses to the issue of copying, while non-expert jurors would determine whether evidence of copying presented by experts was sufficient to be considered infringement based on their perception of an ordinary listener. Experts could no longer comment on whether any similarity they identified amounted to improper appropriation or evaluate the legal extent of any congruence they identified. Instead, they could only contribute what has been called “probative similarity,” or the evaluation of similarity based on close comparisons.⁵³ The contours of expertise, however, were left undefined. Instead, the “ordinary lay hearer,” whose hypothetical perceptions were to be ascertained or, in practice represented, by a jury itself made up of such non-expert listeners, would have the final determination regarding misappropriation. Because of the new test, the *Arnstein* court shifted what had been a question of law, or an issue to be decided by a judge through the application of legal principles, to a question of fact, or an issue regarding facts and evidence to be decided by a jury.

The Impact of Music on the *Arnstein* Appellate Opinions

The new test handed down by the *Arnstein* court, particularly its division between expert and non-expert, seemed to resolve competing factors underlying music copyright infringement and to address case-specific problems with the hurried district court judge and the repeat plaintiff. However, the judges’ solution was idiomatically oriented around music and reflected decades of music copyright case opinions that emphasized the perceptions of the “ordinary listener,” undoubtedly influenced in no small part by

⁵⁰ *Arnstein*, 154 F.2d at 468.

⁵¹ *Arnstein*, 154 F.2d at 469.

⁵² *Arnstein*, 154 F.2d at 468 (citations omitted).

⁵³ See generally Alan Latman, “Probative Similarity as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement,” *Columbia Law Review* 90 (1990): 1187–1222. <https://doi.org/10.2307/1122876>.

concurring Judge L. Hand. By setting forth the new test, Judge Frank created a division between categories of not just observers, but “auditors”:⁵⁴

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. Expert testimony of musicians may also be received, but 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; for the views of such persons are caviar to the general—and plaintiff's and defendant's compositions are not caviar.

The roles that experts and non-experts would play in future cases were specifically constructed according to music and notions of a listening disparity between “lay auditors” and the “refined” ears of experts. The caviar metaphor implied a kind of stratification to listening and the popular status of the songs at issue, as well as the rarity of an acquired understanding believed to be necessary for the courtroom luxury of musical analysis.

This idea follows throughout Judge Frank's opinion, which explicitly pointed to economic issues as a motivator for the distinction between expert and non-expert. According to the Majority, because copyright protects “financial returns” received by the copyright holder, in this case referring to musicians, it was necessary to consider the perceptions of the primarily non-expert audience. This situation therefore seemed to generate a need to restrict experts that seemed inadequately to represent the commercial music market. His concern is contextualized specifically according to the popular music industry assumed to be driven by “lay listeners”:⁵⁵

The proper criterion on [the issue of improper appropriation] is not an analytic or other comparison of the respective musical compositions as they appear on paper or in the judgment of trained musicians. The plaintiff's legally protected interest is not, as such, his reputation as a musician but his interest in the potential financial returns from his compositions which derive from the lay public's approbation of his efforts. The question, therefore, is whether defendant took from plaintiff's works so much of what is pleasing to the ears of *lay listeners*, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.

While expert distinctions may be perceptible by lay listeners, it is equally plausible that they would be only perceptible to “refined” eyes and ears, thereby having comparatively little economic effect.⁵⁶

Judge Frank's decision was undoubtedly influenced by previous cases, concerns for establishing functional procedures, and evidentiary skepticism, all of which can be traced as closely to Judge L. Hand's concurring guidance as to Judge Frank's own ideas about musical structure and training. In an article written two years after the *Arnstein* opinion, he analogized the decisions made by judges and music

⁵⁴ *Arnstein*, 154 F.2d at 473 (citations omitted) (emphasis added). The *Arnstein* test has been expanded through interpretation to refer to “observers.”

⁵⁵ *Arnstein v. Porter*, 154 F.2d 465, 473 (2d Cir. 1946) (citations omitted) (emphasis added).

⁵⁶ For a more recent study on juror listening perceptions, see Jamie Lund, “An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement,” *Virginia Sports and Entertainment Law Journal* 11 (Fall 2011): 137–53.

performers.⁵⁷ Judge Frank used the example of a hypothetical melody in an argument regarding intuitive “hunches” that could not be broken down into analytical elements: “The gestaltist’s favorite illustration is a melody: a melody does not result from the summation of its parts; thus to analyze a melody is to destroy it. It is a basic, primary unit. The melody, a pattern, determines the function of the notes, its parts; the notes, the parts, do not determine the melody.”⁵⁸ This metaphor reveals Judge Frank’s perspective regarding music from which he likely approached the *Arnstein* decision, and provides a clue to his perspective underlying the lay-expert divide. If a melody must be perceived as an indissoluble whole, then expert “dissection” could not be the sole, or even decisive, evidence for determining copyright infringement.⁵⁹ Instead, the ultimate decision regarding infringement was one that “a [non-expert] jury is peculiarly fitted to determine.”⁶⁰

The Majority’s new test ultimately relied on comparative perceptions of an ordinary listener, but it paradoxically guaranteed that experts at least could, and commonly would, contribute to the discussion. The inclusion of expert comparisons may in hindsight seem to have been superfluous, given the predominant role of the non-expert jury whose perceptions were easily inserted as representatives of the average listener. But the persistence of expert witnesses can be traced to what by that time had become common litigation strategy in music cases. This tradition undoubtedly stemmed from the high regard in which musical training was held, particularly the ability to read and compare analytically the sheet music considered to represent materially copyright-protected musical works. Given their skepticism about the nature of musical evidence as a whole, however, the judges’ reduplication of similarity evaluations in the *Arnstein* test resulted in a process complex enough to give the appearance of promoting objectivity, preventing partiality, overcoming discrepancies of opinions resulting from diverse levels in music skill, and accounting for the marketplace and critical reception of musical works.

Judge Clark’s dissenting opinion likewise focused on judicially-perceived peculiarities to musical analysis, albeit with a rare citation to a contemporaneous music appreciation text. He found greater fault in the new test and reasoning than with the outcome of the appeal. The dissenting opinion, which characterized the Majority’s division and redundant roles as having an “anti-intellectual and book-burning nature,”⁶¹ offered a critical counterpoint. Using thematic turns of phrase that played on Porter’s evocative lyrics, Judge Clark railed against the Majority’s reliance on non-expert listeners, whom he found to have suspect qualifications given their supposed lack of musical skill: “the judicial eardrum may be peculiarly insensitive after long years of listening to the ‘beat, beat, beat’ (I find myself plagiarizing from defendant and thus in danger of my brothers’ doom) 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.”⁶² His opinion presented the division of similarity from improper appropriation as one of the fundamental problems with the new test.⁶³

I find nowhere any suggestion of two steps in adjudication of this issue, one of finding copyright which may be approached with musical intelligence and assistance of experts, and

⁵⁷ Jerome N. Frank, “Say It with Music,” *Harvard Law Review* 61 (June 1948): 928–92. <https://doi.org/10.2307/1336139>.

⁵⁸ Frank, 929.

⁵⁹ *Arnstein*, 154 F.2d at 473.

⁶⁰ *Arnstein*, 154 F.2d at 473.

⁶¹ *Arnstein*, 154 F.2d at 476 n.1 (Clark, J., dissenting).

⁶² *Arnstein*, 154 F.2d at 476 (Clark, J., dissenting). Clark’s reference is to the opening lyrics to Porter’s “Night and Day” (“Like the beat, beat, beat of the tom tom/When the jungle shadows fall”).

⁶³ *Arnstein v. Porter*, 154 F.2d 465, 476 n.1 (2d Cir. 1946) (Clark, J., dissenting).

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.

His next concern, which appeared to at least accept hypothetically the Majority's bifurcation of the similarity inquiry, was a matter of musical-legal balance. Citing Stewart Macpherson's music appreciation text, *Form in Music*, to justify the application of "the intellect" of expert dissection, "as well as the emotions" of lay perceptions, his dissenting opinion noted that both are necessary for "a just appreciation of music,"⁶⁴ or a legal evaluation of similarity. While Judge Clark did not elaborate on what such appreciation entailed, it was likely intended to be synonymous with ideas about musical training. Regardless of this imprecision, if jurors were to disregard expert analyses when making their decision as to improper appropriation, the dissent contended that the balance between expert and non-expert would be disturbed.

Matters of balance aside, both the *Arnstein* Majority and its Dissent expressed a need for detailed analyses of the copyrighted works, which in practice would be produced by experts, alongside the totalizing evaluations of non-experts. For the three judges involved in *Arnstein*, the distinction between categories of listeners appeared mutually exclusive, based on the assumption that average listeners could not perceive musical detail and that expert analyses would not offer an accurate perception of average listener comparisons. On the one hand, experts producing "dissections" of musical works were understood to approach music with a theoretical and analytical mindset focused on musical structure and compositional subtlety. On the other hand, the more holistic—and the Dissent might suggest emotional—approach presumptively taken by the non-expert listener, or the jurors likely to insert themselves as representatives, were believed to present an accurate representation of the market impact from any alleged similarity. The retention of both expert and non-expert seemed simultaneously to generate a less partial, evidence-driven decision-making process based on analytical facts while remaining responsive to foundational copyright policies.

Perhaps in an effort to construct what would be construed by later courts as a broadly-applicable infringement test across all copyrightable media, or perhaps due to judicial assumptions about commonly-understood definitions of expert witness and lay-listener as equivalent to the hypothetical average reasonable person, neither opinion dwelled on matters of musical genre or style, let alone the diversity of listener acuity that could blur divisions between expert and non-expert. By establishing a functionalist approach to the evaluation of copyright infringement, the *Arnstein* case nevertheless serves as a legal pivot in the ways that judges approached similarity analysis in copyright infringement litigation. This change of perspective was not simply a product of the judges' jurisprudence or a practical response to the conditions of case. Rather, the language of the appellate opinions suggests that the three judges were concerned specifically with the challenges of musical analysis and nationwide disparities in musical training and skill.

The Legal Impact of the Lay-Expert Divide

For decades, courts in and beyond the Second Circuit have interpreted the *Arnstein v. Porter* decision and its legal test for finding infringement, at times applying it faithfully and, at others, attempting to revise

⁶⁴ *Arnstein*, 154 F.2d at 476 (Clark, J., dissenting) (citing Stewart Macpherson, *Form in Music* (London: J. Williams, 1930), 1–2). A just appreciation is comparable to Macpherson's earlier notion of "true listening."

it.⁶⁵ No matter the application, courts deciding music cases have routinely encountered a variety of problems with this decision-making process that result from divisions between expert and non-expert as well as the order in which each group conducts its analysis. Experts over time have produced increasingly detailed comparisons that can become difficult for non-expert judges and juries to understand.⁶⁶ These analyses can become so complex and abstract that they might fail to represent what non-expert listeners might be expected to hear.⁶⁷ Although hired to serve as ostensibly impartial analysts,⁶⁸ musical experts retained by opposing parties can, and sometimes do, produce conflicting musical comparisons. Their testimony, directed by questions from partial attorneys, can undermine their theoretical explanations of relevant points for musical comparison and their analyses that are otherwise intended to assist judges and jurors. These circumstances at trial can do as much to confuse those individuals as to seemingly nullify any expert contribution. The decisive non-expert evaluation can also be made by judges or jurors inserting themselves as representatives of the hypothetical ordinary observer, weighing evidence according to their own sensibilities, even when it seems to counter the details of expert evidence.

The cumulating force of these issues has been inconsistent, and at times seemingly inequitable, results across cases. While some legal scholars have proposed revisions to the decision-making process that would eliminate one or the other prong of similarity analysis entirely—such as instituting an expert tribunal to replace judge and jury or eliminating expert witnesses altogether in favor of only non-expert evaluations—judges across jurisdictions have consistently retained contributions from both legal groups of listeners.⁶⁹ Instead, they focus on adjusting the legal language of the process without disturbing the roles that experts and non-experts play. But in more recent cases, courts have sought to narrow the identity of non-expert listeners to individuals assumed to have greater-than-average musical knowledge of the works at issue. By elevating the standard of observation without changing the holistic, subjective nature of their analyses, these courts have sought to generate decisions intended to be more in tune with relevant points of musical comparison.

Audience Expertise and New Legal Standards

Some courts have refined the “ordinary observer” standard set forth in *Arnstein* according to legally-constructed notions of audience. In the Fourth Circuit, for example, the court introduced an “intended audience” standard that served to narrow the pool of non-expert listeners, such that musical-legal similarity would be evaluated by listeners with greater acuity and contextual knowledge of musical style

⁶⁵ For a more extended history of the myriad ways that circuit courts have interpreted the *Arnstein* decision, see Leo, “Blurred Lines,” 129–97.

⁶⁶ Leo, “Blurred Lines.”

⁶⁷ See also Lund, “An Empirical Examination,” 137–53.

⁶⁸ Alexander Stewart, “‘Been Caught Stealing’: A Musicologist’s Perspective on Unlicensed Sampling Disputes,” *University of Missouri Kansas City Law Review* (Winter 2014), 339–61, 361.

⁶⁹ Scholars have offered a variety of structures to this hypothetical court, including a court with specialized fact-finders and national jurisdiction (Michael Landau and Donald Biederman, “The Case for a Specialized Copyright Court: Eliminating the Jurisdictional Advantage,” *Hastings Communications and Entertainment Law Journal* 21 (Summer 1999): 717–87; a “musically-educated temporary magistrate” (E. Scott Fruehwald, “Copyright Infringement of Musical Compositions: A Systematic Approach,” *Akron Law Review* 26 (Summer 1992): 15–44, 43); and a three-person “specialized musicology tribunal” (Eric M. Leventhal, “Would You Want William Hung as Your Trier of Fact? The Case for a Specialized Musicology Tribunal,” *Texas Law Review* 90 (May 2012): 1557–96).

and tradition specific to the songs at issue. In so doing, the court seemed to respond to issues with the “ordinary observer” standard without completely overturning a now decades-old decision-making process.

In the landmark 1990 case of *Dawson v. Hinshaw Music*, plaintiff composer-conductor William L. Dawson alleged that his arrangement of the spiritual, “Ezekiel Saw De Wheel,” was infringed by an arrangement of the same song created by Gilbert Martin. Although the song was originally copyrighted in 1940 by John W. Work in a collection of spirituals, folk songs, and hymns, Dawson registered his arrangement in 1942, and sold thousands of copies of it until Kjos assumed control in 1967 as Dawson’s exclusive agent. In 1980, Gilbert Martin composed an arrangement of the same spiritual and granted Hinshaw Music, Inc., control over it. The corporation then registered the arrangement for copyright in 1981. Before filing suit in 1986, Dawson contacted Hinshaw to inform them of potential infringement over his arrangement.⁷⁰ The nature of the lawsuit as revolving around two competing arrangements of the same song, which would inevitably be perceptibly similar, called for careful musical-legal attention to subtler points of comparison not necessarily distinguishable to all ears.

At the bench trial, where the judge served as factfinder in place of a jury, five musical expert witnesses were retained, including Robert Campbell and Herndon Spillman for the Plaintiff, and Alice Parker, Wilton Mason, and Joel Carter for the Defendant. Presiding Judge Ward claimed on the first day of trial that he would rely on these experts, stating:⁷¹

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.

Despite this statement, and in light of evidence that Martin had access to Dawson’s arrangement and the testimony of experts indicating copying-in-fact, Judge Ward decided in favor of Hinshaw. His seemingly peculiar decision turned on Dawson’s failure to enter into evidence recordings of the competing arrangements in court—a presentation of the music in a way that the Judge believed would be perceived better by non-expert, ordinary listeners.

On appeal, the Fourth Circuit court remanded the decision, noting that the relevant point of comparison was sheet music, not a recorded performance. More importantly, it observed that “courts have been slow to recognize explicitly the need for refining the ordinary observer test in such a way that it would adopt the perspective of *the intended audience*.”⁷² Although the court recognized that for certain popular songs, evaluations from the general public, presumed to be comprised of ordinary listeners, might be most appropriate, other cases required a different standard. Finding fault with the existing standard, the court noted that “[o]nly 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.”⁷³ Instead, the court established that “where the intended audience is significantly more specialized than the pool of lay listeners, the reaction of the intended

⁷⁰ *Dawson v. Hinshaw Music, Inc.*, 905 F.2d 731, 732 (4th Cir. 1990).

⁷¹ *Dawson* Trial Transcript, 16–18 (also cited in Philip C. Baxa and M. William Krasilovsky, “Dawson v. Hinshaw Music, Inc.: The Fourth Circuit Revisits Arnstein and the ‘Intended Audience’ Test,” *Fordham Intellectual Property, Media, and Entertainment Law Journal* 1:2 (1991): 91–115).

⁷² *Dawson*, 905 F.2d at 734 (emphasis added).

⁷³ *Dawson*, 905 F. 2d at 735 (referring to *Whelan Associates v. Jaslow Dental Laboratory*, 797 F.2d 1222 (3d Cir.1986)).

audience would be the relevant inquiry.”⁷⁴ Thus, for instances where an audience was presumed by the court to have specialized knowledge, a narrower standard based on revised conceptions of musical skill arguably offered a more accurate representation of the market audience. This new model relied on scholarly commentary on copyright that “[i]f the works in issue are directed to a particular audience, then the “spontaneous and immediate” reaction of that audience is determinative.”⁷⁵ While the *Dawson* court offered no definition for audience or specialized musical knowledge, or even what constitutes a reaction from them, it did identify that an intended audience could often be the general public, but that in the present lawsuit, that audience was comprised of a narrower pool of choral directors. This intended audience was legally determined to be focused more closely on sheet music than recorded performance, so the trial court’s decision needed to be revisited.

Although the Fourth Circuit seemed to ignore that choral directors might easily be admitted as musical experts, who could then be qualified to conduct both prongs of similarity analysis, and its evidentiary distinction between sheet music and recording excluded devoted audience members that would only listen to live or recorded performances from the arrangements, the court did introduce the idea that similarity might be analyzed differently by various groups of non-expert listeners. It attached legal significance to matters such as repertory and style as well as practices of composition and arrangement in dispositive analyses of similarity. Thus, a subtle difference in harmonic voicing or phrasing that might be perceptibly similar in the totalizing comparisons of an ordinary listener might present a distinguishable difference to the overall effect for an intended audience member. Although these issues proved to be more broadly applicable than the *Dawson* case, the inherent similarities between competing arrangements undoubtedly shed new light on matters of audience and listener acuity for the court.

The legal construction of an intended audience posed new musical-legal questions about the appropriate standard for non-expert evaluations of similarity. While an intended audience might bring about more precise results, its make-up would be different across cases, thereby thwarting attempts at consistency. Not only would determining an intended audience prove difficult, but that listener pool could also be separate from an “actual” audience in ways that a composer, publisher, or even a court, could not anticipate. The introduction of this new standard, while retaining the presence of expert witnesses and *Arnstein*’s divided similarity analysis, nevertheless altered what was previously considered a binary opposition between experts and non-experts by generating a spectrum of expertise that empowered at least some listeners according to implicit criteria, such as market participation or musical training. This new standard allowed the court to retain musical expert witnesses, as well as constraints on their analyses to the first prong, and to preserve the holistic comparisons made by non-experts, while seeming to reduce problems caused by seemingly ill-equipped “ordinary” non-experts.

Diversifying Expertise

Although not yet pristine, the more recent “intended audience” standard has proven to be influential on contemporary infringement cases involving music, as well as other copyrightable media, in and outside the Fourth Circuit.⁷⁶ Movement away from the ordinary listener standard identified by other courts as

⁷⁴ *Dawson*, 905 F. 2d at 733.

⁷⁵ *Dawson*, 905 F.2d at 733 (citing M. Nimmer & D. Nimmer, *Nimmer on Copyright* §13.03[E], 13–62.4 n.202 (1989)).

⁷⁶ See, e.g., *Kohus v. Mariol*, 328 F.3d 848, 857 (6th Cir. 2003) (introducing a ‘target audience’ standard).

“inherently subjective” and “out-of-date,”⁷⁷ seems to recognize not only musical knowledge held among individuals otherwise categorized as non-experts, but also to acknowledge a greater diversity of musical skills among this large, legally-categorized group. These contemporary cases continue to revise the decades-old model established in *Arnstein*, but they still retain a bifurcated approach to similarity analysis.

Two cases decided in 2015 in the Southern District of New York, which falls under the jurisdiction of the Second Circuit—*McDonald v. West* and *Lane v. Knowles-Carter*—offer contemporary examples of the incorporation of such a revised standard. In both cases, the presiding court applied a similar “discerning observer” standard, introduced in an earlier copyright case involving quilt squares.⁷⁸ In these cases, it was recordings, rather than notated sheet music, that served as tangible representations of the songs at issue and provided central points of comparison for the courts. This distinction, and any perceptual discrepancies among experts or non-experts that may have resulted from comparing recordings as opposed to sheet music, was legally less relevant to the decision-making process than elevating the standard of musical skill required for non-expert comparison.

McDonald v. West hinged on a procedural argument indicating that Plaintiff Joel R. McDonald’s claim to his song “Made in America” was infringed by a song of the same name on R&B-hip-hop performers Kanye West and Jay-Z’s album, *Watch the Throne*, the court engaged in substantial similarity analysis to highlight that the Plaintiff had failed to state a claim for which legal relief could be granted.⁷⁹ In *Lane v. Knowles-Carter*, Plaintiff Ahmad Javon Lane sued R&B star Beyoncé over the use of “X&O” as shorthand for “kisses and hugs” in the title and lyrical content of her song—copying Lane’s “XOXO” in her “XO” off her self-titled album—as well as similarities in the beginnings of the two songs.⁸⁰ Both cases were resolved, perhaps unsurprisingly, in favor of the defendants, but it is the method for approaching the legal evaluation of musical similarity that is significant to understand judicial conceptions of expertise.

In some ways more specific than the intended audience standard, the “discerning observer” standard these cases applied requires a higher level of awareness and understanding among non-experts to permit their discernment between relevant points of comparison and stylistic commonality. This test calls for non-experts to separate protected and unprotected elements before making holistic comparisons of the protected elements with regard to putative infringement.⁸¹ As the court explained in *McDonald*:⁸²

When a plaintiff alleges infringement of a copyrighted work that incorporates significant elements from the public domain, however, the “ordinary observer” test must become “more discerning.” . . . [A] court applying the “more discerning observer” test may not simply “dissect the works at issue into separate components and compare only the copyrightable elements.” This would narrow copyright too much, and render protection for the selection and arrangement of public domain elements a dead letter. When applying the “more discerning observer” test, the Court must make sure to engage in a holistic comparison of the two works, looking for substantial similarity that is apparent “only when numerous aesthetic decisions embodied in the plaintiff’s work of art—the excerpting, modifying, and arranging of [unprotectible components] [sic] ...—are considered in relation to one another.”

⁷⁷ *Rebecca Francescatti v. Stefani Germanotta*, 2014 WL 2767231, *9 (N.D. Ill. June 17, 2014) (citations omitted).

⁷⁸ *Boisson v. Banian, Ltd.*, 273 F.3d 262, 272 (2d Cir. 2001).

⁷⁹ *McDonald v. West*, 2015 WL 5751197 (Sept. 30 2015).

⁸⁰ *Lane v. Knowles-Carter*, 2015 WL 639540 (Oct. 21 2015).

⁸¹ The filtration of ‘protectable’ and ‘unprotectable’ elements derives from a separate test for evaluating copyright infringement specific to computer software introduced in the Second Circuit. See *Comput. Assoc. Int. Inc. v. Altai Inc.*, 982 F.2d 693 (2d Cir. 1992).

⁸² 2015 WL 5751197 at *4 (citations omitted).

According to the new test, a court must consider the source of similarity when examining works comprised of both protectable and non-protectable material, which would be typical of many popular music styles. Although the dispositive, totalizing evaluation made by non-experts remains intact, this elevated legal standard requires a higher level of awareness and understanding of matters including style, genre, and tradition to permit the discernment between protected and unprotected elements when evaluating improper appropriation.

Despite the introduction of alternative standards, the “ordinary observer” standard continues to influence musical-legal similarity analysis across appellate circuits has deep roots in early-twentieth century copyright cases and judicial conceptions of musical skill. The notion that members of a public listening audience lack musical training, yet constitute the majority of a commercial music market, paralleled arguments for a contemporaneous music appreciation movement and notions that music requires the cultivation of listening skill to understand. When considered in conjunction with a legal tradition in and beyond copyright law of consulting expert witnesses and underlying copyright policy based on creators’ market control over their works, these ideas contributed to the development of a redundant legal process that relied on holistic musical-legal evaluations of similarity by “lay,” “average,” or “ordinary” listeners expressly because of their perceived lack of musical expertise coupled with their purchasing power.⁸³ The consequences have been anything but what the *Arnstein v. Porter* judges had hoped, however, instead generating decades of inconsistent case outcomes.

Since the late-twentieth century, courts have begun to reinterpret musical expertise to reflect a diversity of listening skill and acuity among non-expert listeners. Whether an “intended audience” or a “discerning observer” is introduced, these legal standards have begun to reimagine the “ordinary observer” in ways that acknowledge musical skills possessed by non-expert listeners as a kind of expertise relevant to legal inquiries, yet still separate from that of the expert witness now dominated by academic or forensic musicologists. While courts have not established definitive contours for these hypothetical, specialized, yet non-expert, listeners, they appear to have recognized a spectrum of listening skill and knowledge that influences comparisons of allegedly similar works in and beyond the courtroom. Without creating a new decision-making process or changing the roles divided between so-called experts and non-experts since the mid-twentieth century, these new standards are altering the ways that the non-expert’s role might be fulfilled. Although the impact of these more recent decisions remains inconclusive, their revisions seem to begin addressing more acutely the diversity of “ordinary” listener skills and problems generated by judicial conceptions of musical expertise.

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⁸³ The role of expert witnesses in US law and the evidence they can introduce are currently governed by the Federal Rules of Evidence (FRE). See Public Law 93-595 Jan. 2 1975, Rules 702–706. Case law interprets and provides more structural detail, including evaluating the credibility and admissibility of expert testimony and the application of these standards across all types of expertise. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993); *Kumho Tyre Co. v. Carmichael*, 526 US. 137 (1999). Different areas of law can establish idiosyncratic standards of expertise. For example, patent law relies on notions of Person Having Ordinary Skill in the Art (PHOSITA). See, e.g., *KSR v. Teleflex*, 550 US 398 (2007).

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