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Music Copyright in Theory and Practice: An Improved Approach for Determining Substantial Similarity

Stephanie J. Jones*

INTRODUCTION

Of the three elements necessary to prove copyright infringement—copyright ownership, access, and substantial similarity¹—the last is not only the most important component, but also the most difficult to define and apply. Copyright ownership is a statutory formality easily satisfied prior to the institution of litigation.² Access is a straightforward proof question that can be disposed of by a showing of striking similarity.³ However, no copyright action can succeed without a showing of substantial similarity, making the concept the theoretical and practical cornerstone of copyright litigation. Unfortunately, substantial similarity is impossible to define, and nearly as onerous to apply.

The substantial similarity standard is particularly difficult to define and implement in the litigation of music copyright actions. Despite numerous attempts, the federal courts have failed to formulate a fully utilitarian framework for determining musical substantial similarity.

The most realistic method adopted to date is that currently em-

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² Registration of the copyright is a mandatory prerequisite to filing a federal copyright infringement claim. 1976 Copyright Act, 17 USC § 411 (1992). However, the requirements for copyright registration are minimal. Sid & Marty Krofft Television v McDonald's Corporation, 562 F2d 1157, 1163 n 5 (9th Cir 1977). The registered work need not be new, but simply an original creation of the copyright owner. See Copyright Act, 17 USC at § 201, § 411, § 501(b); Krofft, 562 F2d at 1163 n 5, citing Donald v Uarco Business Forms, 478 F2d 764, 765-66 (8th Cir 1973); Roth Greeting Cards v United Card Co., 429 F2d 1106, 1109 (9th Cir 1979); Alfred Bell & Co. v Catalda Fine Arts, 191 F2d 99, 102-03 (2d Cir 1951).
³ See, for example Arnstein v Porter, 154 F2d 464, 468 (2d Cir 1946).
ployed in the Ninth Circuit. Commonly called “the Krofft test,” this process consists of a two-part examination designed to determine substantial similarity between all types of creative works. The fact finder must determine whether both the ideas and expression of ideas embodied in the allegedly infringing creative work are substantially similar to those in the plaintiff’s version. The determination of similarity of ideas depends upon extrinsic, objective factors. The resolution of whether the expression of the ideas is similar is determined using the sensibilities of a reasonable layperson.

In theory, the Krofft test appears to be a sound method for determining substantial similarity in all types of creative works, including music. This test is fundamentally and operationally flawed in two ways. First, the Krofft test for similarity of ideas, as drafted, applies to all forms of expression, yet ignores the unique aspects of certain types of expression. Music is particularly ill-suited to the analysis designed by Krofft; due to music’s inherently distinctive features which dictate a different inquiry to determine substantial similarity. Second, the dual Krofft test is founded upon a misapplication of previous copyright cases and, as currently applied in the Ninth Circuit, is not only confusing to the fact finder but can improperly influence and actually skew the outcome of music copyright actions.

Part I of this Article traces the evolution and fine-tuning of the Krofft substantial similarity test. Part II exposes the inherent difficulties in the Ninth Circuit’s traditional, yet overbroad application of the Krofft test by examining the complications it caused in a recent music copyright case, Thompson v Richie.

4. This test was first articulated in Krofft, 562 F2d at 1164 (cited in Note 2).
5. Id.
6. Id.
7. In 1985 Lionel Richie was sued for copyright infringement by Gene Thompson in U.S. District Court for the Central District of California. Thompson v Richie, No. CV 85-1583 (CD Cal filed March 7, 1985)(“Richie I”). Also named as defendants were Richie’s record producer James Anthony Carmichael, his publishing company Brockman Music, and his record company, Motown Record Corporation. Prior to trial, the District Court granted summary judgment on behalf of the defendants. Id (June 20, 1986)(order granting summary judgment).


After remand to the trial court, Tracy Singleton joined Thompson in a new suit against Richie, alleging that Richie’s song “Sela” was an infringement of their composition “You
Part III recommends that the Ninth Circuit revise its substantial similarity test in two ways. First, the court should adopt a precise definition of a musical idea, making uniform the application of the substantial similarity test in all music copyright actions. Second, the Ninth Circuit courts must change the order in which the parties present their evidence to eliminate the confusion faced by fact finders and appellate courts and increase the reliability of the verdicts in these cases. In following these suggestions, the courts will not only simplify the litigation process in the Ninth Circuit, they will also increase the integrity and reduce inequity in the litigation of music copyright actions.

A. Development of the Substantial Similarity Test

1. Early U.S. Copyright Laws and the Concept of "Copying"

Although the first recorded copyright case was decided in the year 567, the concept of copyright was first recognized in the United States in 1783 when the Colonial Congress passed a resolution recommending that states provide copyright protection to authors or publishers of new books. Both Connecticut and Massachusetts passed copyright laws that year, and by 1786, each of the states (except Delaware) had enacted copyright laws. The following year, the Colonial Congress granted to Congress the power to
grant copyrights to "Authors and Inventors."  

On May 31, 1790, Congress passed the first federal copyright act "for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies." The 1790 Act provided that anyone who "shall print, reprint, publish, or import, or cause to be printed, reprinted, published, or imported . . . without the consent of the author or proprietor thereof" shall forfeit all copies of such infringing material and/or pay a fine. In 1856, the Act was expanded to include protection of dramatic works, and musical compositions and artwork were included in 1870.

In 1891, the Copyright Act was revised to, inter alia, prohibit persons from "... engraving, etching, working, copying, printing, publishing dramatizing, translating, or importing, either in whole or in part . . ." the work of others. While the Act still made no mention of substantial similarity, it recognized that something less than complete reproduction could still constitute illegal copying. Congress did not, however, say what quantity of similarity was necessary to demonstrate copying. In addition, Congress unfortunately never improved upon this fleeting focus on similarity.

When Congress enacted the United States Copyright Act of 1909, it again failed to mention the concept of substantiality. It merely prohibited the "copying" of another's creative expression.

13. Id at § 2.
17. 1909 Copyright Act, 17 USC § 4, 5 (1909). The 1909 Act covered only published works; unpublished works remained protectable only under state common laws. Among the many other revisions (most of which became effective in 1978), the 1976 Act protected both published and unpublished works. 1976 Copyright Act, 17 USC § 102 et seq (1992). See, for example Emerson v Davies, 8 F Cases 615 (D Mass 1845); Drury v Ewing, 7 F Cases 1113 (D Ohio 1862); Gray v Russell, 10 F Cases 1035 (D Mass 1839) Clayton v Stone, 5 F Cases 999 (SD NY 1829).
18. The term "copying" is shorthand for the infringement of any one of the copyright holder's so-called "bundle of rights," namely, the rights to reproduce, adapt, distribute, publicly perform, and publicly display one's creative work. 1976 Copyright Act, 17 USC § 106 (1992); see, for example Stewart v Abend, 495 US 207, 220; Overman v Universal City Studios, Inc., 659 F2d 963, 966 (9th Cir 1981).

Prior to the enactment of the 1909 Act, various courts used the concept of copying in copyright infringement actions. See Emerson v Davies, 8 F Cases at 615 (cited in note 17). For an in-depth discussion of copyright pre-1909 see Amy B. Cohen: Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity, 20 UC Davis L Rev 719.
Thus, the problem continued. Congress did make clear that the Copyright Law afforded protection only to the expression of ideas, not ideas themselves. For example, Rodin's "The Thinker" is an expression of the idea of sober contemplation. Anyone can compose a song, write a book, draw a sketch or even cast a sculpture expressing this idea without necessarily infringing Rodin's rights in his work. Rodin's sculpture, however, (i.e., his expression of the idea of contemplation) cannot be copied.

This balancing of permission to use ideas with a prohibition against borrowing an expression of ideas is appropriate since copyright law has sought throughout its history to promote and protect "the progress of science and useful arts." In fact, prohibiting the liberal borrowing of ideas would stifle the free flow of ideas necessary to facilitate true creativity. As noted copyright commentator Melville Nimmer wrote:

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\text{[T]he idea-expression line represents an acceptable definitional balance as between copyright and free speech interests. In some degree it encroaches upon freedom of speech in that it abridges the right to reproduce the "expression" of others, but this is justified by the greater public good in the copyright encouragement of creative works. In some degree it encroaches upon the author's right to control his works in that it renders his "ideas" per se unprotectible, but this is justified by the greater public need for free access to ideas as part of the democratic dialogue.}\]

Unfortunately, the Copyright law does not make clear the extent to which one must replicate Rodin's sculpture or any other work in order to venture from the safe harbor of ideas into the stormy seas of unlawful infringement.

Congress failed to improve this framework when it overhauled the Copyright Law in 1976. In fact, the 1976 Act, like its predecessor, is strangely silent as to substantial similarity, although by 1976, the federal courts had already developed a significant reliance upon the doctrine. The 1976 Act's legislative history does, however, indicate that Congress intended to prohibit copying another's expression "in whole or in any substantial part, and by

(1987)("Cohen, Masking").


20. Becker v Loew's, Inc., 133 F2d 889, 891 (7th Cir 1943).


22. See note 62 and accompanying text.
duplicating it *exactly or by imitation or simulation.*"²³ Implicit in this prohibition is the suggestion that mere copying is not enough to constitute infringement; the alleged infringer must have copied the work exactly or by imitation or simulation. Arguably, an exact or imitative duplication is synonymous with substantial similarity; however, Congress offered no real guidance on the issue. This quagmire has been left for the courts to resolve.

2. Development of the Substantial Similarity Test in the Federal Courts

a. Nineteenth Century Cases

During the mid-1800s, the federal courts first attempted to define "copying," and, toward this end, introduced an early version of the substantial similarity test. In *Emerson v Davies,*²⁴ the federal circuit court sitting in Massachusetts held that copying was shown by: 1) proof that defendant had actually seen plaintiff's material and 2) demonstration that "the 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."²⁵

In 1868, in *Daly v Palmer,*²⁶ the federal circuit court sitting in New York announced the "audience test," when it stated that the works in question are:

1. recognized by the spectator; 2) through any of senses to which the representation is addressed [3] as conveying substantially the same impressions to, and exciting the same emotions in the mind in the same sequence and order.²⁷

This test represented the court's attempt to apply to copyright actions the "reasonable person" doctrine found in other areas of the law.²⁸

Although the audience test was modified significantly in later years, as a result of *Daly* it has become an essential component in

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²⁴ 8 F Cases 615 (D Mass 1845).
²⁵ *Emerson,* 8 F Cases at 622 (emphasis added).
²⁶ 6 F Cases 1132 (SD NY 1868).
²⁷ *Daly,* 6 F Cases at 1138.
²⁸ Nimmer, *Copyright,* Section 13.03[E][2] at 62.6 (cited in note 1).
the determination of substantial similarity. Other circuit courts followed suit and by the end of the nineteenth century, it was generally accepted throughout the circuits that illegal copying was proven by a showing of defendant's access to plaintiff's material, and that a reasonable observer would find the material to have substantial identity or similarity. 

Even as they almost unanimously adopted a substantial similarity test to ascertain illegal copying, however, the federal courts did not define "substantial" nor did they explain the point at which mere similarity is sufficient to demonstrate misappropriation. The Congress did not fill the gap. With each revision of the Copyright Act, Congress remained strangely silent on the issue of substantial similarity.

b. The Nichols Model

With no statutory guidance as to how to define "unlawful copying" or "substantial similarity," the federal courts adopted an "I can't define it but I know it when I see it" approach following the 1909 Act. In Nichols v Universal Pictures Corporation, the Second Circuit Court of Appeals addressed the question of whether defendant infringed plaintiff's copyright when it produced a film entitled "The Cohens and The Kellys," which plaintiff claimed was taken from his play, "Abie's Irish Rose." Both plays employed a "Romeo and Juliet" theme, involving a forbidden romance between an Irish character and Jewish character whose families are in conflict. Writing for the court, Judge Learned Hand acknowledged that copyright protection of a literary property is not limited to cases in which defendant exactly copied plaintiff's work and recognized the need for a determination of "substantiality":

Then, the question is whether the part so taken is 'substantial,' and therefore not a 'fair use' of the copyrighted work; it is the same question as arises in the case of any other copyrighted work. But when the plagiarist does not take out a block in situ, but an abstract of the whole, decision is more troublesome.

Judge Hand then admitted that a definition of substantiality was elusive at best, and pronounced an "Abstractions Test" to deal with the problem.

29. See, for example Greene v Bishop, 10 F Cases 1128 (D Mass 1858); Drury v Ewing, 7 F Cases 1113 (SD Ohio 1862).
30. 45 F2d 119 (2d Cir 1930).
31. Nichols, 45 F2d at 121 (citations omitted).
Upon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his ‘ideas,’ to which, apart from their expression, his property is never extended. Nobody has ever been able to fix that boundary, and nobody ever can.\(^3\)

Nichols thus represented the federal courts’ first recognition of the idea-expression dichotomy in copyright infringement actions.

Although Judge Hand admitted the law’s inability to demarcate between permissible copying and infringement (where the copying of the idea ends and the copying of the expression begins), he did draw a line in one sense: Nichols distinctly rejected the use of expert opinion and analytic dissection to resolve the issue. The plaintiff therein had presented to the court an intricate appraisal of the two plays in question. The plaintiff’s analysis pointed to a “quadrangle” of the characters common to both plays, in which each character was represented by the emotions - anger, love, anxiety, despondency, hope, joy, disgust.

In spurning this analytic scrutiny, Judge Hand wrote:

This is 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 of each character. We cannot approve the length of the record, which was due chiefly to the use of expert witnesses. Argument is argument whether in the box or at the bar, and its proper place is the last. The testimony of an expert on such issues, especially his cross-examination, greatly extends the trial and contributes nothing which cannot be better heard after the evidence is all submitted. It ought not to be allowed at all . . . We hope that in this class of cases such evidence may in the future be entirely excluded, and the case confined to the actual issues; that is . . . whether the defendant copied it, so far as the supposed infringement is identical.\(^3\)

Initially, Nichols was not universally accepted; in fact, the Second Circuit later criticized Judge Hand’s abstractions test in Shipman v RKO,\(^3\)\(^4\) saying that the term “abstractions” merely renames the old method of comparing the “‘similarity of sequences of incident’. It is naturally difficult to compare literary works by using the terminology of metaphysics, and the rule thus provided does not seem to have been used since its suggestion.”\(^3\)\(^5\)

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32. Id (citations omitted) (emphasis added).
33. Id at 123 (emphasis added).
34. 100 F2d 533 (2d Cir 1938).
35. Shipman, 100 F2d at 537.
his concurrence that, indeed, cases since Nichols had applied the abstractions test\textsuperscript{36} and had:

followed exactly the same doctrine that we are using now: it held that there is a point where the similarities are so little concrete (are therefore so abstract) that they become only 'theme', 'idea', or skeleton of the plot, and that these are always in the public domain; no copyright can protect them. The test is necessarily vague and nothing more definite can be said about it.\textsuperscript{37}

Over the years, courts and commentators have come to appreciate the wisdom and farsightedness of Hand’s recognition of the differences between idea and expression, and that substantial similarity is a troublesome, yet necessary, element of determining copyright infringement.\textsuperscript{38} Unfortunately, however, although later courts recognized the insight of the Abstractions Test, they failed to realize that implicit in Judge Hand’s Abstractions analysis is the reality that similarity of expression does not always constitute copyright infringement. It is possible that some similar expressions are part of the public domain, and therefore, not protectible by copyright.

c. Arnstein v Porter

Eight years after Shipman, the Second Circuit Court of Appeals, attempting to incorporate Judge Hand’s abstractions analysis, announced what has become one of the most quoted, yet misunderstood cases in copyright. In Arnstein v Porter,\textsuperscript{39} the court rejected the litigious Ira B. Arnstein’s\textsuperscript{40} claim that popular composer Cole Porter’s songs, “Begin the Beguine,” “My Heart Belongs to Daddy,” “I Love You,” “Night and Day,” “I Love You Madly,” “You’d Be So Nice to Come Home To,” and “Don’t Fence Me In,” plagiarized

\begin{thebibliography}{9}
\item 36. For example Sheldon v Metro-Goldwyn-Mayer, 81 F2d 49 (2d Cir 1936).
\item 37. Shipman, 100 F2d at 538.
\item 38. See Krofft, 562 F2d at 1163 (“No court or commentator ... has been able to improve upon Judge Learned Hand’s famous ‘abstractions test’”); Burroughs v Metro-Goldwyn-Mayer, Inc., 683 F2d 610, 624 (2d Cir 1982).
\item 39. 154 F2d 464 (2d Cir 1946).
\item 40. Arnstein is notable as the last of eight unsuccessful copyright infringement actions brought in 12 years against various defendants by Arnstein, a perpetually disgruntled songwriter who fervently believed his material had been stolen. See, for example Arnstein v Shilkret, No. 8152 (SD NY 1933); Arnstein v. Edward B. Marks Music Corp., 11 F Supp 535 (SD NY 1935); Arnstein v American Society of Composers, Authors and Publishers, 29 F Supp 388 (SD NY 1939); Arnstein v Broadcast Music, Inc., 46 F Supp 379 (SD NY 1942); Arnstein v 20th Century Fox Film Corp., 52 F Supp 114 (SD NY 1943). For more on Ira Arnstein, see Jeffrey A. Reed, “The Trials and Tribulations of Ira B. Arnstein,” (unpublished manuscript) ASCAP Copyright Symposium 1991 Nathan Burkan Memorial Competition.
\end{thebibliography}
songs written by Arnstein.

The panel (which included Judge Hand) drafted an implied two-part test—a test that owed at least a small part to Judge Hand's abstractions test—for detecting copying. This test later became the questionable blueprint for the Ninth Circuit's Krofft Test.

The court adopted what has been called the "Inverse Ratio Rule," under which no amount of evidence of access can prove copying if the material in question is not similar. On the other hand, the works which contain similarities that are so striking as to preclude the possibility that the defendant could have created his work independently of plaintiff's work justify an inference of copying, without more. Unfortunately, the Court failed to indicate at which point on the continuum between dissimilar and strikingly similar the concept of substantial similarity may fall.

The "Inverse Ratio Rule" effectively deals with the two extremes in copyright actions, yet it does not address the more likely situations that fall in the middle ground. The court drafted a two-part analysis to deal with such cases.

The first part of the test articulated by the Arnstein court examined access and similarity: a showing that the defendant had access to plaintiff's work and that the two works contained similarities could support an inference of copying. The court suggested that the first prong of the test consists of analytic dissection, perhaps through expert testimony:

As to . . . 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 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.43

If this dissection reveals the presence of some structural similarity, and plaintiff proves that defendant had access to his material, copying is established. However, the court stated that mere copying is not enough, since there is such a thing as "permissible copying," in other words, copying that does not amount to copyright infringement. If copying is established, the fact finder must apply the second portion of the test, namely, he must evaluate whether

42. Arnstein, 154 F2d 468 (footnotes omitted).
43. Arnstein, 154 F2d at 472.
the similarities are sufficient to lead an average layperson to believe that the defendant _illicitly_ copied plaintiff's work:

On that issue . . . the test is the response of the ordinary lay hearer; accordingly, on that issue, "dissection" and expert testimony are irrelevant . . . Whether (if he copied) defendant unlawfully appropriated presents, too, an issue of fact. The proper criterion on that issue is not an analytic or other comparison of the respective . . . compositions . . . The plaintiff's legally protected interest is the potential financial return 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 [eyes and] ears of lay[persons], who comprise the audience for whom such popular [works are] composed, that defendant wrongfully appropriated something which belongs to the plaintiff."

Similarities sufficient to lead to the conclusion that they are not mere coincidence are enough to support an inference of illicit copying. However, like its predecessors, the Arnstein court could not and did not indicate any point at which similarities become substantial enough to justify such an inference. Although the court did not specifically interpret "substantial similarity," it held that similarities sufficient to lead a fact finder to conclude that the similarities are not mere coincidence are sufficient to permit a finding of illicit copying—copyright infringement.

The court asserted that "analytic or other comparison" is not the proper criterion for the layperson portion of the test, yet it is appropriate for the parties to present expert testimony for the limited purpose of assisting the trier of fact in determining the reactions of lay auditors [in the layperson portion of the test]. 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.

Obviously, under Arnstein, the use of expert testimony is not limited to the analytic portion of the test. Expert testimony may be presented, when necessary, in the subjective part of the test.

It has been assumed that the Arnstein panel implied that courts should apply the analytic portion of the test first, then move on to the average layperson test. If this is true, however, the court failed to follow its own apparent suggestion, leaping over the analytic portion of the test directly to the audience test:

44. Id at 468, 472-73 (footnotes omitted).
45. Id at 469.
46. Id at 473.
47. See Krofft, 562 F2d at 1165.
We turn first to the issue of copying. After listening to the compositions as played in the phonograph recordings submitted by defendant, we find similarities; but we hold that unquestionably, standing alone, they do not compel the conclusion, or permit the inference, that defendant copied. The similarities, however, are sufficient so that, if there is enough evidence of access to permit the case to go to the jury, the jury may properly infer that the similarities did not result from coincidence.\textsuperscript{48}

The court did not apply the analytic dissection it had apparently recommended; it merely found that the recordings \textit{sounded} similar, and that the similarities could be considered substantial if the plaintiff submitted strong evidence of access.\textsuperscript{49} The court did not bifurcate the test or employ any analytic dissection.\textsuperscript{50}

Moreover, contrary to subsequent interpretation, in formulating this copying versus illicit copying test, the \textit{Arnstein} court made no mention of any dichotomy between the expression of an idea and the idea itself; in fact, the court does not refer at all to either ideas or expressions.\textsuperscript{51} It is possible that the test tacitly recognizes the idea-expression dichotomy, since the existence of similarities in the works could demonstrate duplication of the idea, while the substantiality of the similarities establishes the extent of copying of the expression. When, however the court's glaring failure even to refer to the idea-expression dichotomy is considered in light of its seemingly inconsistent application of its copying versus illicit copying test, it becomes apparent that the \textit{Arnstein} panel intended to formulate a test far different than often assumed.

Under \textit{Arnstein}, the appropriate consideration is whether an average layperson would recognize the disputed works as substantially similar.\textsuperscript{52} If the fact finder concludes that the material is not substantially similar under this test, copyright infringement has not been proven.\textsuperscript{53}

If, however, the material does appear to an average layperson to be substantially similar, expert testimony would be appropriate to assess whether the material that plaintiff claims is substantially similar to defendant's is protectible (in other words, whether it is truly expression, not merely an idea, or whether the expression is

\textsuperscript{48} Arnstein, 154 F2d at 469.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{52} Arnstein, 154 F2d at 469.
\textsuperscript{53} Id.
Later courts utterly disregarded the Arnstein court's evident intentions, instead either lumping the two tests together completely, or strictly bifurcating them so that experts play no part in the layperson analysis.

Until the mid 1970s, most courts took the former approach, virtually abandoning the analytical dissection portion of the test, relying instead upon the observations of a reasonable layperson. For example, in Ideal Toy Corp. v Fab-Lu Ltd., the Second Circuit defined "substantial similarity" as sufficient similarity to cause an average layperson to recognize the alleged copy as having been appropriated from the copyrighted work. The Ideal Toy court justified its truncation of the first part of the Arnstein substantial similarity test on the ground that Arnstein's tactic was merely an alternative way of formulating the issue of substantial similarity.

Ironically, one notable exception to this pattern occurred in Second Circuit when the United States District Court for the Southern District of New York relied heavily upon expert testimony and analytical dissection to determine that George Harrison had unintentionally plagiarized "He's So Fine" when he composed "My Sweet Lord." The court explained:

He's So Fine ... is a catchy tune consisting essentially of four repetitions of a very short basic musical phrase "sol-mi-re," (hereinafter motif A), altered as necessary to fit the words, followed by four repetitions of another short basic musical phrase, "sol-la-do-la-do," (hereinafter motif B). While neither motif is novel, the four repetitions of A, followed by four repetitions of B, is a highly unique pattern. In addition, in the second use of the motif B series, there is a grace note inserted making the phrase go "sol-la-do-la-re-do."

My Sweet Lord ... also uses the same motif A (modified to suit the words) four times, followed by motif B repeated three times, not four. In place of He's So Fine' fourth repetition of motif B My Sweet Lord has a transitional passage of musical attractiveness of the same approximate length, with the identical grace note in the identical second repetition. The
harmonies of both songs are identical.  

*Bright Tunes* notwithstanding, by the mid-1970s it was generally accepted in many Circuits that copyright infringement was proven by evidence that 1) the defendant had access to the plaintiff's copyrighted work; and 2) a reasonable layperson would find defendant's material to be substantially similar to plaintiff's work.  

Analytic dissection, with or without expert testimony, was not an essential component.

B. The Krofft Test

With the increase of copyright infringement actions in its territory, the Ninth Circuit attempted to rekindle attention to the idea-expression dichotomy. In *Sid & Marty Krofft Productions v McDonald's Corporation*, the Court developed a strict bifurcated test expressly designed to embrace the idea-expression dichotomy. While it represented a noble attempt to deal with this difficult concept, however, *Krofft* may have caused more problems than it solved.

In *Krofft*, McDonald's was accused of copying Sid & Marty Krofft's H.R. PufnStuf television show in their McDonaldland advertising campaign. In finding that the defendant had infringed the Kroffts' copyright, the court revived the *Arnstein* test, but ignored the practical application. The *Krofft* court bemoaned the demise of the idea-expression concept in copyright cases, noting that it is a necessary component of copyright litigation.

It has often been said that in order to establish copyright infringement a plaintiff must prove ownership of the copyright and "copying" by the defendant. "Copying," in turn, is said to be shown by circumstantial evidence of access to the copyrighted work and substantial similarity between the copyrighted work and defendant's work. . . . Under such statements, infringement would be established upon proof of ownership, access, and substantial similarity. Application of this rule, however, would produce some untenable results . . . The test for infringement . . . has been given a new

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61. *Bright Tunes*, 420 F Supp at 178 (footnotes omitted). The court noted that George Harrison's expert witnesses claimed the songs were not substantially similar since they contained different words and number of syllables. The court rejected this argument on the ground that song lyrics are completely unrelated to the essential musical kernel. Id at 178 n 6.

62. See, for example *Reyher v Children's Television Workshop*, 533 F2d at 90 (cited in note 56); *Universal Athletic Sales Co. v Salteld*, 511 F2d 904 (3d Cir 1975); *Blumcraft of Pittsburgh v Newman Brothers, Inc.*, 373 F2d 905 (6th Cir 1967); *Gray v. Eskimo Pie Corporation*, 244 F Supp 785 (D Delaware 1965).

63. 562 F2d 1157.
dimension. There must be ownership of the copyright and access to the copyrighted work. But there also must be substantial similarity not only of the general ideas but of the expressions of those ideas as well. Thus two steps in the analytic process are implied by the requirement of substantial similarity.64

The court held that the trier of fact must employ a two part analysis to determine substantial similarity. The first half of the test objectively considers similarity of ideas.

We shall call this the ‘extrinsic test.’ It is extrinsic because it depends not on the responses of the trier of fact, but on specific criteria which can be listed and analyzed. Such criteria include the type of artwork involved, the materials used, the subject matter, and the setting for the subject. Since it is an extrinsic test, analytic dissection and expert testimony are appropriate.66

The court then instructed lower courts to next apply the “intrinsic test” to determine whether a reasonable layperson would find the two works substantially similar.

The test to be applied in determining whether there is substantial similarity in expressions shall be labeled an intrinsic one - depending on the response of the ordinary reasonable person. 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.68

The court insisted that it was not making new law, but was merely developing the theme that Arnstein had sounded thirty years before.

We believe that the court in Arnstein was alluding to the idea-expression dichotomy which we make explicit today. When the court in Arnstein refers to “copying” which is not itself an infringement, it must be suggesting copying merely of the work’s idea, which is not protected by the copyright. To constitute an infringement, the copying must reach the point of “unlawful appropriation” or the copying of the protected expression itself. We analyze this distinction in terms both of the elements involved idea and expression and of the tests to be used extrinsic and intrinsic in an effort to clarify the issues involved.67

This bold assumption of what the Arnstein court “must be suggesting” has been roundly criticized.68 One critic even called Krofft
“easily the most foolish of the Ninth Circuit’s copyright decisions.”

The fundamental problem with the Krofft test is that it is rooted in a misunderstanding of Arnstein. The Krofft court understandably wished to refine the test for substantial similarity. Instead of making surgical adjustments in keeping with Arnstein, however, the Krofft court greatly distorted the intention of the Arnstein panel, yet claimed that it was merely making explicit what the Arnstein court alluded to. The fact that it was misconstruing the Arnstein model was, however, of no concern to the Krofft court.

We do not resurrect the Arnstein approach today. Rather we formulate an extrinsic-intrinsic test for infringement based on the idea-expression dichotomy. We believe that the Arnstein court was doing nearly the same thing. But the fact that it may not have been does not subtract from our analysis.

When it insisted that the substantial similarity test be strictly bifurcated into an extrinsic/intrinsic (expert/layperson) analysis, the Krofft court ignored the Arnstein language that recommended using expert testimony to illuminate the layperson assessment.

C. Post-Krofft

The effect of Krofft on copyright actions has been significant. Prior to Krofft, the Ninth Circuit courts struggled with the concept of substantial similarity. After 1977, the courts treated the issue as having been settled, applying the Krofft test with few questions or changes. The few changes that were made were merely adjustments and minor interpretations.

Beginning in 1981, a series of cases attempted to define an “idea” for the purpose of applying the Krofft test. These cases

ASCAP Copyright Symposium 1991 Nathan Burkan Memorial Competition (“Frankel, Infringement”).

69. Liebig, Copyright Inroads on the Public Domain in the Ninth Circuit, 9 Ent L Rep No 7 (December, 1987)(“Liebig, Inroads”).
70. Krofft, 562 F2d at 1165-66 n 7.
71. See, for example International Luggage Registry v Avery Products Corporation, 541 F2d 830 (9th Cir 1976); Goodson-Todman Enterprises, Ltd. v Kellogg Company, 513 F2d 913 (9th Cir 1975); Roth Greeting Cards v United Card Company, 429 F2d at 1106; Schultz v Holmes, 264 F2d 942 (9th Cir 1959).
72. See notes 73-81 and accompanying text.
73. See, for example Shaw v Lindheim, 908 F2d 531 (9th Cir 1990); Litchfield v Spielberg, 736 F2d 1352 (9th Cir 1984) cert denied 470 U.S. 1052 (1985); Bekic v Crichton, 761 F2d 1289 (9th Cir 1985), cert denied 474 US 826 (1985); Jason v Fonda, 526 F Supp 774 (CD Cal 1981) aff’d and incorporated by reference, 698 F2d 966 (9th Cir 1982).
defined idea as “plot, themes, dialogue, mood, setting, pace, characters, and sequence.”

In addition, the court changed the designation of the extrinsic/intrinsic test to an objective/subjective standard. Under the objective test, the court assesses similarity of ideas. Although the court attempted to define ideas, this definition was limited to literature, i.e., theme, plot, setting, pace, characters, and dialogue. Under the subjective test, one looks to the subjective response by the trier of fact as to similarity between the total concept and feel of the works.

One district court applied the Krofft test in a manner more in keeping with the original Arnstein analysis. In Overman v Universal City Studios, the United States District Court for the Central District of California granted summary judgment in favor of Universal City Studios in a copyright action in which plaintiff claimed that the studio and co-defendant Richard Pryor used elements of his work in the film “Bustin’ Loose.” The court applied the Krofft test in the order defined by Krofft—extrinsic analysis followed by intrinsic impressions. After finding, however, that the films in question were not similar in expression, the court revisited the extrinsic test and found that it did not support a finding of substantial similarity:

The analytical discussion offered by plaintiff does not persuade the Court otherwise . . . [P]laintiff enumerates 19 points of alleged similarity among his underlying and derivative works and defendants’ screenplay. Of these, points A, B, G, H and M, relating to the basic story line and the general development of the characters and their relationships, involve only unprotected abstract ideas, and not expression. Some of the other alleged similarities, points D, I, J, and S, fall under the category of “scenes a faire,” forms of expression which are either stock scenes or which flow necessarily from the elements common to the two works. Still other claimed similarities, points C3, C4, E, K, L, N and O simply do not exist. All of the scenes or characters mentioned in these points are clearly distinct as among the competing works either with respect to their expression or as to their function or role within the particular work. The remaining alleged similarities, points C1, C2, F, P, Q and R, are somewhat similar but not so similar as to support plaintiff’s copying claim. The use by defendants of these few iso-

74. Shaw, 908 F2d at 537.
75. Id.
76. Id.
77. Id at 535. The Shaw court recognized the “total concept and feel” standard, first articulated in Roth Greeting Cards v United Card Co., 429 F2d at 1110.
78. Overman, 605 F Supp at 350.
79. Id at 353.
lated similar character traits and scenes does not give rise to a copyright infringement.\textsuperscript{80}

Although the court made a cursory nod to the Ninth Circuit's requirement that the extrinsic/objective portion be tried first, the court actually reversed the order of the tests.

The Ninth Circuit courts have, for the most part, however, followed the Krofft test as drafted.\textsuperscript{81} This has not only perpetuated the attractive features of the Krofft test, it has deeply ingrained into copyright procedure the serious flaws the Krofft court engendered.

**DEFICIENCIES OF THE KROFFT TEST**

A. Failure to Define Musical Idea

The Ninth Circuit courts have barely acknowledged, much less tried to assuage the two major flaws inherent in the Krofft test. Until these problems are addressed and remedied, however, music copyright litigation will remain unnecessarily cumbersome and unreliable.

The first problem with the Krofft test is its failure to appreciate the inherently distinctive features of music that make it difficult to fit within the Krofft framework. In Krofft and its progeny, the Ninth Circuit Court of Appeals defined "idea" as subject matter, setting, materials used, theme, plot, sequence of events, mood, setting, pace, character, and so forth.\textsuperscript{82}

How does this apply to music? Simply stated, it does not. The materials, subject matter and setting of a song are usually the musical instruments used, lyrics, arrangements, and related material. These elements are peripheral augmentations, however, not elements of the composition itself. Unlike a literary idea, which was carefully defined in Shaw,\textsuperscript{83} a musical idea has not been directly addressed by the federal courts.

It is commonly believed that a musical idea consists of more than only melody, harmony and rhythm. It is widely believed that many factors—some of which are completely unrelated to the stark

\textsuperscript{80} Id at 353-54.

\textsuperscript{81} Notably, no other jurisdiction has adopted the Krofft test; thus, the Ninth Circuit stands alone in its approach to substantial similarity. Most circuits have adopted a version of the Second Circuit's Arnstein analysis. See Frankel, Infringement (cited in note 68).

\textsuperscript{82} Shaw, 908 F2d at 537.

\textsuperscript{83} Id.
composition itself—contribute to a musical idea. These factors are deemed to include tone, pitch, tempo, spatial organization, consonance, dissonance, phrasing, accents, note choice, combinations, interplay of instruments, bass lines, and the like. One common misconception is that a song’s lyrics represent the idea of the composition; however, lyrics constitute ideas that are absolutely distinct from the musical ideas. For example, the lyrics of Bruce Springsteen song, “Born in the U.S.A.” connote pride and patriotism. When rapper Luther Campbell changed the title of the song to “Banned in U.S.A.” and replaced Springsteen’s lyrics with sentiments highly critical of government censorship, an entirely different idea was conveyed. Notwithstanding the change in lyrical idea, the music remained the same and the musical idea was not altered.

Unfortunately, the Ninth Circuit courts have not developed a uniform standard for determining what factors should be considered in assessing a musical idea. In fact, the courts have offered no sound guidelines for defining or interpreting musical ideas in copyright actions. This ambiguity creates significant difficulties in applying the objective/extrinsic test under Krofft, since no one is sure what the standard is.

B. Confusion

The second problem with the Krofft test is rooted in its misconstruction of the Nichols and Arnstein analyses. Both cases imply that in most copyright actions, the analysis should be progressive, in other words, the fact finder first determines copying, and then determines illicit copying: idea expression. Both cases also strongly implied, however, that the fact that the expression seems substantially similar does not mean that illicit copying took place. It is possible that the expression may seem similar to a reasonable layperson, but there is another reason that copyright infringement is not present.

As a result, the test is confusing at best and at worst can distort

84. See, for example Debra Presti Brent, The Successful Musical Copyright Infringement Suit: The Impossible Dream, 7 U Miami Ent & Sports L Rev 229 (Spring 1990).
85. Id at 241.
86. Bright Tunes, 420 F Supp at 178. See note 61.
88. See notes 67-70 and accompanying text.
89. See notes 30-54 and accompanying text.
90. Id.
and skew the outcome of music copyright actions. The principal problem is the possibility of improper influence. For example, a juror listening to an articulate, impressively credentialed expert offer extended testimony about the intricacies of the songs' structural similarities (using, perhaps one of the variety of standards used in these cases) could easily be convinced that the songs *sound* similar when he may not have reached such a conclusion had he listened to the material prior to hearing the expert testimony.

Learned Hand recognized this potential in the *Nichols* case in 1930:

> [The admission of expert testimony] cumbers the case and tends to confusion, for the more the court is led into the intricacies of dramatic craftsmanship, the less likely it is to stand upon the firmer, if more naive, ground of its considered impressions upon its own perusal. 91

This danger of confusion is even more likely in copyright cases involving music, an area of which the average layperson has little understanding. Such confusion could lead to skewed verdicts and defeat the purpose of the bifurcated test.

The test is crafted in a dual manner in order to rigidly protect the idea-expression dichotomy. Nevertheless, in practice it is all but impossible to prevent such permeation of the issues.

C. *Thompson v Richie*

The problems of the improper influence of expert testimony on the jury's verdict was perfectly illustrated in a recent music copyright case involving pop singer-songwriter Lionel Richie. In *Thompson v Richie*, 92 two unknown songwriters accused Richie of copying their material in his songs "Sela", "Stuck on You" and "Deep River Woman." 93 The litigation was unnecessarily protracted and complicated as a direct result of the deficiencies in the *Krofft* test.

The lawsuit was filed in 1985 in the United States District Court for the Central District of California. 94 The following year, the District Court granted summary judgment in Richie's favor, finding that there was no substantial similarity of ideas and expression be-

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91. *Nichols*, 45 F2d at 123 (cited in note 30).
92. See note 7 and accompanying text.
93. The plaintiffs also brought claims for intentional and negligent infliction of emotional distress, which claims were dismissed by stipulation. *Richie I* (cited in note 7).
94. Id.
tween the plaintiff's and Richie's songs.\footnote{Id. Richie conceded access for the limited purpose of summary judgment. Id.}

In reaching this conclusion, Judge Ideman applied the \textit{Krofft} extrinsic/intrinsic analysis.\footnote{Id.} He first considered the testimony of plaintiffs' expert witness, Dr. Robert Winter, who declared that there were similarities in the melody, harmony and rhythm of the material in question.\footnote{Id.} After listening to recordings of the material, however, Judge Ideman found that no reasonable person could find any such similarities were substantial.\footnote{Id.} In addition, Judge Ideman found the lawsuit to be "frivolous" and awarded Richie $34,000 in attorney fees and court costs.\footnote{Id.}

The Ninth Circuit Court of Appeals reversed in 1987, questioning the trial court's findings as to both ideas and expression.\footnote{Richie II (cited in note 7).} The court found that plaintiff's expert raised a question of fact on the issue of similarity of ideas.\footnote{Id.} Although the court did not attempt expressly to define a musical idea, it held that the expert's claim that nineteen of the twenty pitches in the opening phrases of the songs, plus similarities in the harmony and tempo raised a question of fact.\footnote{Id.}

On the issue of similarity of expression, the appellate court held that there was also a question of fact that precluded summary judgment.\footnote{Id.} Although it found that "the two songs appear to have little similarity," the court stated that "the ears of the court must yield to the ears of jurors" since there is "no bright line . . . as to what quantum of similarity is permitted before crossing into the realm of substantial similarity."\footnote{Id.} The court also reversed Judge Ideman's award of fees and costs since, because the case was going to trial, it could not be deemed frivolous.\footnote{Id.}

The case first went to trial in May of 1991. Pursuant to an earlier trifurcation order\footnote{Order of Trifurcation and Separate Trials (January 29, 1989), Richie III (cited in note 7).}, the parties were to try the intrinsic portion of the test first, followed by the extrinsic test. The determination

\begin{itemize}
\item \footnote{Richie II (cited in note 7).}
\item \footnote{Id.}
\item \footnote{Id.}
\item \footnote{Id.}
\item \footnote{Id.}
\item \footnote{Id. This finding is particularly troubling since, the Court appears to hold that summary judgment in copyright actions is \textit{never} appropriate.}
\item \footnote{Id.}
\item \footnote{Order of Trifurcation and Separate Trials (January 29, 1989), Richie III (cited in note 7).}
\end{itemize}
of whether Richie had access to plaintiffs' material was to be addressed last. Unfortunately, when the court attempted to apply this order, the court agreed with plaintiffs' attorney that the intrinsic test subsumed the extrinsic test. Specifically, the court maintained that, should the jury find the songs to be substantially similar under the extrinsic test, such a finding would be deemed a finding that the ideas expressed were similar, and thus, the extrinsic test would have been satisfied without any analytic dissection or expert testimony. Unable to resolve the confusion, the court

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107. Id.
109. The problems and confusion caused by the Krofft test is apparent in the colloquy between District Court Judge Marianna Phaelzer and counsel:

THE COURT: All right. Now if you should get a finding of substantial similarity on the intrinsic portion of this test you will then want to put on an expert, won't you?

MR. STEINHART: Well, I take the position that this phase is on the substantial similarity of expression... Once that is proved, that subsumes substantial similarity of idea because it is the substantial similarity of expression of the ideas. If the jury finds there is substantial similarity of expression, ipso facto they have found there is substantial similarity of the ideas being expressed, so there is no need for any further trial on the issue of substantial similarity.

THE COURT: I would agree with you about that.

MR. ISAACMAN: That is not the law in the Ninth Circuit, Your Honor. There is both an extrinsic test and an intrinsic test.

THE COURT: I know that.

MR. ISAACMAN: From the extrinsic test there is an opportunity for us to present evidence that these ideas are not similar, that we have an opportunity to present evidence that the material is not protectible material, that it is public.

THE COURT: No, that is a different problem... If they were to come in with a decision that the intrinsic test had been satisfied on substantial similarity, they have found, have they not, in effect those things on the extrinsic test.

MR. STEINHART: According to Krofft the extrinsic test is merely to determine substantial similarity of idea.

THE COURT: Yes.

MR. STEINHART: And the intrinsic test is merely to determine substantial similarity of the expression of the idea. If a finder of fact finds there is substantial similarity of expression of ideas in applying an intrinsic test how—it would be illogical. They couldn't find that there was not substantial similarity of ideas.

THE COURT: That is my point.

MR. ISAACMAN: Your Honor, I don't think that that is the law in the Ninth Circuit. I think we are entitled to present to a trier of fact this similarity in the ideas and that they are entitled to return a finding that the ideas are not similar. Unless the plaintiff satisfies both the intrinsic test and the extrinsic test then the plaintiff has not carried his burden.

THE COURT: I know... In the music area there has to be proof of substantial similarity of ideas as well as substantial similarity of expression. I think it is worthwhile... I look at these issues in all these cases particularly with reference to the motions that were made to trifurcate the case, and I was convinced at that point that this is a good idea, that they would be able to tell you whether there was similarity of expression or not, but we are now in a position having listened - only listened to the
declared a mistrial.\textsuperscript{110}

The case finally went to trial in late 1991 on all of the issues.\textsuperscript{111} As a result, the jury heard witnesses testify about access, followed by an expert witness, followed by another witness on access, and so forth.\textsuperscript{112} Throughout the proceedings, the plaintiff played the songs for the jury. The result was a hodge-podge of separate issues.

Another vague aspect of the trial was the expert testimony. The experts for each party used entirely different standards to determine whether there existed any substantial similarity of ideas. Garnett Brown, plaintiffs' expert, claimed that the idea inherent in both plaintiff's and defendant's songs was that the songs were forms of popular music.\textsuperscript{113} According to Brown, a musical idea does not exist until it is expressed in musical form.\textsuperscript{114} However, once it is expressed, it is no longer merely an idea—it has crossed into the

\textsuperscript{110} Richie III (cited in note 7).
\textsuperscript{111} Author's notes (cited in note 7).
\textsuperscript{112} Id.
\textsuperscript{113} Telephone interview with Garnet Brown, April 16, 1992.
\textsuperscript{114} Id.
realm of expression.\textsuperscript{116}

On the other hand, D. Anthony Ricigliano, Richie's music expert, testified that a musical idea is a musical thought that implies a self-contained entity.\textsuperscript{116} Ricigliano examined the musical ideas in the material and determined that Richie's musical ideas were utterly distinct from the ideas contained in plaintiffs' music.\textsuperscript{117}

It is impossible to determine what effect this method of presenting evidence had upon the jury. After a few hours of deliberation, the jury found that Richie had not heard the plaintiff's songs, and thus could not have infringed their copyright.\textsuperscript{118} The jury never reached the issue of substantial similarity of expression or idea.\textsuperscript{119} Had the jury been required to assess substantial similarity, however, it would have been difficult to prevent their considerations from being tainted.

One serious problem in this case resulted from the participants' disparate views as to the nature of a musical idea. Throughout the proceedings, musical idea was defined as 1) a musical thought implying a self-contained entity (defendant's expert);\textsuperscript{120} 2) a musical genre (plaintiff's expert);\textsuperscript{121} and 3) pitch, harmony, and tempo (the Court of Appeals).\textsuperscript{122} It is possible, moreover, that, had the plaintiffs' appeal of the jury verdict been perfected,\textsuperscript{123} a different three-judge panel on the Court of Appeals would have applied an entirely different definition.

In addition, the order of the proceedings could have led to serious confusion.\textsuperscript{124} Even if the court had structured the trial according to the \textit{Krofft} mandate,\textsuperscript{125} problems for the jury could still have existed. Certainly, a jury could not have avoided being influenced by the considerable expert testimony that occupied several days of the three-week trial. As the trial was conducted, however, confusion was virtually guaranteed. It would have been very difficult for the jury to strictly bifurcate their impressions of the evidence of

\begin{itemize}
  \item 115. Id.
  \item 116. Author's notes (cited in note 7); letter from D. Anthony Ricigliano to author (February 3, 1992) (discussing musical ideas).
  \item 117. Id.
  \item 119. Id.
  \item 120. See note 116 and accompanying text.
  \item 121. See notes 113-115 and accompanying text.
  \item 122. \textit{Richie II} (cited in note 7).
  \item 123. The plaintiffs voluntarily dismissed their appeal. \textit{Richie III} (cited in note 7).
  \item 124. See note 105-111 and accompanying text.
  \item 125. See notes 63-67 and accompanying text.
\end{itemize}
similarity of idea and expression after the issues were presented in whatever order the plaintiff chose. In the Richie case, this lack of bifurcation proved not to be a problem since the plaintiffs failed to prove that Richie had heard their song; thus, it was legally impossible for Richie to have infringed his copyright.

**Revisions to the Krofft Test**

The Krofft test is inherently, but not fatally flawed. Although the problems are serious, the solution need not be draconian. It is possible to significantly improve the test by making two adjustments.

**A. Definition of Musical Idea**

The failure and/or inability of the Ninth Circuit Court of Appeals to provide any clear guidance as to the definition of musical idea has left the district courts to their own devices, thereby promoting inconsistency in copyright litigation actions. It is therefore necessary to formulate and apply a consistent definition of musical idea. It is difficult for most persons not schooled in music to devise an accurate definition of musical idea, since it requires an acute insight into musical theory. Nevertheless, it is possible to develop a workable test, even if it means stepping outside the legal community to do so.

The most practical and comprehensive definition found is that devised by D. Anthony Ricigliano, whose work in copyright litigation cases has enabled him to develop a clear understanding of the necessary interrelation between music and legal theory in these cases. According to Ricigliano, a musical idea is a musical thought which implies a self-contained entity; however, it generally represents only a portion or fragment of a musical work which usually contains multiple ideas. A musical idea may be: 1) a single line of pitch or rhythm (melodic); 2) a vertical group of pitches (harmonic or chordal); 3) a series of time values without pitch (rhythmic); or 4) a combination of pitch, rhythm and chord(s).

A musical idea may consist of a single note, rhythm or chord.

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126. Ricigliano, chairman of the Theory Department at the Manhattan School of Music, has assisted plaintiffs and defendants, including Lionel Richie, Michael Jackson, Mick Jagger and Julio Iglesias, in a number of music copyright actions. See *Intersong-USA v CBS, Inc*, 757 F Supp 274 (SD NY 1991).
128. Id.
129. Id.
For example, the opening "idea" of the song "One" consists of a single note, followed by rest.\footnote{130}{Id.}

More often, however, a melodic or musical idea consists of two or more notes (pitch and rhythm).\footnote{131}{Id.} Some examples of compositions that contain such ideas are:

- **2-Note Musical Ideas:** "Feelings" "People" "Sunny" "Lady"
- **3-Note Musical Ideas:** "Yesterday"
- **4-Note Musical Ideas:** "Sleepy Time Gal" "We Are the World"
- **10-Note Musical Ideas:** "They All Laughed (At Christopher Columbus)"\footnote{132}{Id.}

The end of a musical idea is usually determined by either 1) immediate repetition of the same or varied idea; 2) the appearance of a longer note value and/or a rest; or 3) the start of another different musical idea.\footnote{133}{Id.} When a work is accompanied by lyrics, the lyrics are often used to determine the length of the musical idea; however, the content or idea of the lyrics do not constitute the idea of the song.\footnote{134}{Id.}

Use of this definition of musical idea would assist immeasurably the determination of substantial similarity of musical works. In the Richie case, the appellate court, plaintiffs' expert, and defendants' expert each had a different concept of what constituted a musical idea.\footnote{135}{Id.} The case would certainly have been aided and shortened had everyone involved at least had some common idea of what the rules are. Instead, the parties were forced to incur substantial expense and inconvenience in the protracted, five-year litigation.\footnote{136}{Id.}

While it may not encompass every possible situation, Ricigliano's definition recognizes the unique aspects of music that make it completely different from all other forms of copyrightable expression. It addresses the structural and artistic features of music while giving clear guidance to the fact finder as to what she is analyzing. Most importantly, it makes uniform the standard to be used to determine substantial similarity of musical ideas in copy-
right actions in the Ninth Circuit.

B. Reverse the Order of the Substantial Similarity Test

The second proposed solution to the difficulties found in *Krofft* is for the Ninth Circuit to apply the test in a manner similar to that used in the *Overman* case. The first prong of the test should be the reasonable layperson test. The fact finder should listen to the songs in question without having heard any potentially prejudicial expert testimony. If the fact finder believes the material is not substantially similar, the case ends.

If, on the other hand, the fact finder believes that the songs sound substantially similar, there would be a rebuttable presumption that the ideas and expressions in the material are substantially similar. The case would then proceed to the second step: the defendant could present evidence showing that the similarities detected were similarities in idea, not expression, and/or that the similarities in expressions were based upon material found in the public domain and therefore, not copyrightable.

Had this test been applied in the *Richie* lawsuit, the case would have proceeded as follows: immediately after being impaneled, the jury would have listened to the songs in dispute. If they believed that the songs did not sound substantially similar in overall context and feel, the case would have ended with a verdict for Richie. If, on the other hand, the jury believed the compositions sounded substantially similar, there would have arisen a rebuttable presumption that the works were indeed substantially similar in expression and idea. At that point, Richie could have presented an expert to explain the differences between ideas and expressions within the songs.

For example, plaintiffs contended that Richie's "Stuck on You" contains a 17-note sequence that sounds, to an average layperson, substantially similar to an 11-note sequence in their "Somebody's Got to Love Her." According to Ricigliano, however, this similarity constitutes a mere idea. The concluding five notes that complete the thought are considerably different in "Stuck on You"
than the nine concluding notes in "Somebody’s Got to Love Her." Thus, these ideas are not substantially similar.142

Even if the jury believed this similarity in ideas to be sufficient to constitute similarity of expression, however, the descending progression occurring in both compositions is a common sequence frequently found in popular music.143 As such, it is in the public domain and is not subject to copyright infringement.144

Certainly, such expert testimony could be taken prior to listening to the songs; however, it would probably be necessary for the jury to listen to the material in order to follow and understand the expert testimony. Therefore, the fact finders' aural impressions of the material would likely be affected by the expert's own impressions of the material.145

If the jury first listens to the material without any outside influence, however, the decision it would render would be far more pristine than if it considers the songs after hearing expert testimony.146 It is less likely that the jury's determination that the material sounds similar would influence their consideration of the objective expert testimony than that the expert testimony would influence the jury's aural impressions.147

The approach recommended by Ricigliano148 has been questioned on the ground that the intrinsic test questions whether the expression of the idea is substantially similar and the extrinsic test deals only with whether the ideas are similar.149 As set forth in Nichols and Arnstein, however, this is not true in practice: it is quite possible for the expressions to sound similar to an untrained ear, even if there has been no infringement.150

Ricigliano's approach151 would substantially remedy the confusion found in these cases and would also considerably shorten the time spent in such cases. If plaintiff's case is strong, the jury would have to employ both the extrinsic and intrinsic tests in order to determine the existence of substantial similarity. However, if a case is weak but strong enough to survive summary judgment, as

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142. See note 91 and accompanying text.
143. Id.
144. Id.
145. See note 90 and accompanying text.
146. Id.
147. Id.
148. See notes 126-34 and accompanying text.
149. Richie III, Transcript of Proceedings (cited in note 7)
150. See notes 30-54 and accompanying text.
151. See notes 126-34 and accompanying text.
was plaintiff's claim in the *Richie* litigation, Ricigliano's method would likely terminate the trial at a much earlier stage.

Moreover, Ricigliano's approach reduces the risk that the jury will be improperly influenced by the expert testimony. The lay listener test would be performed as it should be - the initial visceral reaction of the fact finder would be the gauge without influence from the expert testimony. If, without considering any analytic dissection of the material, the jury finds the material not to be substantially similar, reliance on such a finding is in keeping with the true purpose of copyright protection. If a layperson's ear does not detect similarities between the works, the second composer's work could not be deemed to interfere with the original author's financial or commercial return. The courts must recognize this reality and apply the test in a way that reflects the true nature of copyright law.

Ricigliano's method advances the purpose of copyright. As noted in *Arnstein*, the plaintiff's legally protected interest is the potential benefit he gains from his compositions which derives from the lay persons acceptance of his work. Unless the defendant's material *sounds* substantially similar to plaintiff's work, and thus could interfere with plaintiff's potential benefit from exploitation of his work, plaintiff has suffered no real harm. It follows that, even if the similarities between the works are substantial enough for defendant's material to interfere with plaintiff's public benefits, unless the defendant has actually taken something of plaintiff's that was entitled to protection (as opposed to the copying of mere ideas or public domain material), plaintiff should not be permitted to recover from defendant.

In addition, Ricigliano's method of determining copyright infringement balances the competing interests of protecting the artist while encouraging the free flow of ideas, and at the same time, ensures that copyright decisions are more reliable and accurate.

**Conclusion**

The foregoing revisions to the *Krofft* test are attractive and viable for three reasons. First, they resolve a problem that has plagued lawyers and courts since the announcement of the *Krofft*
two-part substantial similarity test. Second, the revisions accurately reflect the true nature of copyright infringement actions and take into account the unique aspects of music that make the current test unworkable in music actions. Finally, the revisions are relatively minor and will not require a major overhaul of the now well-settled Krofft test. The revisions merely represent a significant fine-tuning that will make the test a truly functional and resourceful method for determining substantial similarity in music copyright actions.

156. For a discussion of Krofft, see notes 63-67 and accompanying text.
157. See notes 82-87 and accompanying text.
158. See notes 63-67 and accompanying text.