No Justice for Johnson? A Proposal for Determining Substantial Similarity in Pop Music

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NO JUSTICE FOR JOHNSON? A PROPOSAL FOR DETERMINING SUBSTANTIAL SIMILARITY IN POP MUSIC

I. INTRODUCTION

Popular ("pop") music is one of the most recognizable and lucrative musical styles today, which makes it more likely to be the subject of infringement claims. Typically, an unknown songwriter claims infringement by alleging "that a popular, financially successful piece has been copied from his work" and that clearly "the defendant has stolen his masterpiece." The accused infringer, however, "will allege that he has never heard the [songwriter's] composition and has independently composed his piece." Often composers believe their work has been copied due to the wide availability of pop music that gives the accused infringer easy access to the songwriter's work and because of the natural similarities that arise in this musical style. The dichotomy in pop music is that composers want to protect their work to ensure that its potential market is not diminished. New music requires familiarity, however, in order to be accepted by consumers and generate profit.

The question of whether two works are so "substantially similar" that one has infringed the other is further complicated because "common themes frequently reappear in various compositions" due to the "limited number of notes and chords available to composers." Pop music is particularly susceptible to

2. Id.
3. Gaste v. Kaiserman, 863 F.2d 1061, 1068 (2d Cir. 1988). Substantial similarity between two works is a question to be decided under the second part of the Feist copyright infringement test. Feist Publ'n, Inc., v. Rural Telephone,
this phenomenon. Moreover, the simplicity that is required of pop music, because it is marketed toward young and musically unsophisticated audiences, leads to resemblances among numerous pieces within the pop genre. Further, the substantial similarity test has been criticized for its lack of clear guidelines and inconsistent application. The recent decision on copyright infringement in Johnson v. Gordon has once again raised questions as to the efficacy of the substantial similarity test.

This case note argues that the court applied the wrong test in Johnson v. Gordon. Due to the simple nature of pop music and the fact that it is marketed toward a young and unsophisticated audience, questions of whether copyright infringement of pop music has occurred should be determined by the "total concept and feel" test, with a focus on intrinsic analysis. Section II of this article provides background information, including a summary of Johnson v. Gordon, and other instances of copyright infringement in the pop realm. In addition, Section II will compare the characteristics of pop music with classical music in order to understand why pop music is more susceptible to claims of infringement. Also, it will explain how the court in Johnson determined whether the defendant unlawfully copied the plaintiff's work. Section III will examine whether the Johnson court used the correct test to determine copyright infringement, several problems

499 U.S. 340, 361 (1991). The first part of the test to determine whether copying had occurred is whether the plaintiff owned a valid copyright in the work. Id. at 361. The second part requires that the defendant copied constituent elements of the work that are original. Id. The second part of the test involves two steps. Lotus Dev. Corp. v. Borland Int'l, Inc., 49 F.3d 807, 813 (1st Cir. 1995). First, the plaintiff must show the defendant copied the plaintiff's work as a factual matter which can be demonstrated either by direct or indirect evidence. Id. Second, the plaintiff must show that the copying was so extensive that the two works are substantially similar. Id. According to Black's Law Dictionary, substantial similarity is "[a] strong resemblance between a copyright work and an alleged infringement, thereby creating an inference of unauthorized copying. The standard for substantial similarity is whether an ordinary person would conclude that the alleged infringement has appropriated nontrivial amounts of the copyrighted work's expressions." BLACK'S LAW DICTIONARY 1417 (8th ed. 2004).

4. Gaste, 863 F.2d at 1068.
the substantial similarity test presents and whether the correct test should depend upon the type of work at issue. Finally, it will argue that a more appropriate test could have been applied in *Johnson*. Section IV discusses the impact of the *Johnson* decision, whether a uniform analysis for substantial similarity should exist among the circuits, and how musicians can protect their work from copyright infringement.

II. BACKGROUND

A. Summary of *Johnson v. Gordon*

The U.S. Court of Appeals for the First Circuit recently decided the case of *Johnson v. Gordon*, which involved a claim of plagiarism. Sometime between 1990 and 1992, the plaintiff, Johnson, created the musical composition “You’re the One (For Me)” for the band Special Edition. In 1994, in an attempt to obtain a record deal for the band on the RCA Records label, Johnson met with Kenny Ortiz, RCA’s vice-president. Special Edition was not successful in their attempts to sign a record deal, but the video and audio tapes of the band performing “You’re the One (For Me)” given to Ortiz at the meeting were not returned to the band.

In March of 1996, the female R&B group Sisters With Voices (“SWV”) released a single entitled “You’re the One,” which was later released on their album, “New Beginning,” both of which were very successful on the Billboard chart and in sales. SWV had a contract with RCA Records at the time.

Johnson suspected that Special Edition’s recorded version of “You’re the One (For Me),” still in RCA’s hands, was given to

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6. *Id.*
7. *Id.* at 15.
8. *Id.*
9. *Id.*
10. *Id.*
SWV, who subsequently made their own version of the song.\textsuperscript{12} Although Johnson's work received copyright protection from the time it was fixed in a tangible medium, in order to bring a suit against BMG (the parent company of RCA Records) he had to obtain copyright registration from the Copyright Office, which he did on July 19, 1996.\textsuperscript{13}

At the trial level, the magistrate judge granted summary judgment for the defendants, after determining that certain comparisons that the plaintiff's expert witness made between the two versions showed the elements were either too dissimilar or too common to constitute infringement.\textsuperscript{14} The plaintiff had a "long" and "short" version of his song, however, only the "short" version had been registered with the Copyright Office.\textsuperscript{15} While the plaintiff claimed several elements of the "long" version were infringed, only those elements that were "borrowed" from the registered underlying work, i.e. the "short" version, could receive protection.\textsuperscript{16}

Consequently, the appellate court considered four elements of similarity between the "short" version of Johnson's composition and SWV's version.\textsuperscript{17} The first element the court examined was

\textsuperscript{12} Id.
\textsuperscript{13} Id. at 15, 20. Plaintiff had two versions of his song, the "short" version and the "long" version, but only the "short" version had been registered with the Copyright Office. Id. at 15. According to Ricordi & Co. v. Paramount Pictures, 189 F.2d 469 (2d Cir. 1951), an unregistered work may be the subject of a suit so long as the elements at issue are those "borrowed" from a registered underlying work. Id. at 20; See Ricordi, 189 F.2d at 472. "[E]lements distinct to an unregistered work cannot draw protection from a registered work even though the latter may contain the seminal idea that inspired both works." Johnson, 409 F.3d at 20. Here, Johnson attempted to compare four elements of the "long" version with SWV's version, but the plaintiff did not argue that these elements were derived from the "short" version. Id. Consequently, these elements were not examined by the court. Id.
\textsuperscript{14} Johnson, 409 F.3d at 16.
\textsuperscript{15} Id. at 15.
\textsuperscript{16} Id. at 20.
\textsuperscript{17} Id. In order to show copyright infringement, Johnson would have to show either that actual copying occurred, either by direct or circumstantial evidence, or that the alleged infringer had access to plaintiff's work, and a sufficient degree of similarity between the works. Id. at 18, (citing Segrets, Inc.
whether there was substantial similarity between bars 16 and 17 of the plaintiff’s version, and bars 1 and 2 of the defendant’s version.\(^\text{18}\) The expert witness testified that the defendant’s version could be viewed as either an inversion or a retrograde of the plaintiff’s melody; however, further investigation revealed that much more rearrangement was necessary to find any similarity between the two melodies.\(^\text{19}\) In order to bring the two melodies within the realm of comparison, the plaintiff’s melody would have to be changed to the key of D flat, the whole melody would have to be raised a perfect fifth, then the inversion would be applied, the rhythm altered and then an extra note added.\(^\text{20}\) Still the melody would not be exactly the same.\(^\text{21}\) Additionally, the court noted that the resulting pattern, a five note descending scale, is a “very common” melodic pattern.\(^\text{22}\) If the plaintiff’s melody was retrograded, the rhythm would have to be altered, a note added, and still the melodies would not be the same.\(^\text{23}\) The court also acknowledged that musicians are limited in the notes, melodic patterns, rhythms, and themes they can employ in compositions, particularly in popular music.\(^\text{24}\) Moreover, the court noted that the two melodies would not likely sound similar to the ordinary

\[\text{v. Gillman Knitwear Co., 207 F.3d 56, 60 (1st Cir. 2000)}.\] Additionally, he would have to show that the copying is actionable by “proving that the copying of the copyrighted material was so extensive that it rendered the infringing and copyrighted works ‘substantially similar’.” \(\text{Id.}\)

\(^{18}\) \text{Johnson, 409 F.3d at 21.}\)

\(^{19}\) \text{Id. In Johnson, the expert witnesses’ explanation of the terms “inversion” and “retrograde”, relied on a standard music dictionary. Id. n.4. Inversion is a technique by which “each ascending interval of an entire melody is changed into its opposite descending interval and vice versa.” Id. Retrograde is “a term indicating reverse or backward motion, e.g., beginning with the last note of the melody and ending with the first.” Id.}\)

\(^{20}\) \text{Id. The court explains that when such a drawn out process is necessary to compare melodies, there is no case law support for finding substantial similarity between the compositions. Id. n.5.}\)

\(^{21}\) \text{Id.}\)

\(^{22}\) \text{Id.}\)

\(^{23}\) \text{Id. at 22.}\)

\(^{24}\) \text{Johnson, 409 F.3d at 22 (citing Selle v. Gibb, 741 F.2d 896, 905 (7th Cir. 1984)).}\)
The second element for comparison between SWV's recording and the plaintiff's version was the harmonic progression between bars 17 and 18 of the plaintiff's version, and bars 1 and 2 of defendant's version. While the progression is the same in the two recordings, a mediant chord (III) followed by a supertonic (II), is a very common pattern found in popular and jazz music. The court quoted the plaintiff's expert to explain that the purpose of this type of progression is to "create a sense of instability . . . with the hope of resolving at some point," and that the progression can be found in thousands of songs. The progression here is not protectable expression because it is so common that it lacks creativity and originality.

The third element occurred in the melody in bars 41 through 44 of the plaintiff's song, and 17 through 20 of the defendant's song. The similarity here was a repeated three-note segment on E-flat that occurred in both compositions. Even the plaintiff's own witness noted that this was a mere coincidence, and that aside from the segment, the other notes in the passages had no similarities.

Finally, the court considered the use of the phrase "You're the One for Me" in the title and lyrics of both compositions. It acknowledged that the use of the phrase was similar, but also that it was very common, hundreds of composers had used the same or similar words, and that there is no copyright protection for clichés or generally expressed ideas. After examining these elements,
the court held that Johnson did not prove substantial similarity between the two works, and, therefore, did not meet the requirement of actual copying.\textsuperscript{35}

\textbf{B. Other Instances of Similar Copyright Infringement}

Johnson’s claim of copyright infringement is certainly nothing new in the area of pop music. Whether intentional, subconscious, or coincidental, infringement claims seem to be just another step in the record producing process.

1. \textit{Selle v. Gibb}

In \textit{Selle v. Gibb}, the plaintiff composer brought an infringement action against the Gibb brothers, members of the singing group known as the Bee Gees.\textsuperscript{36} Selle had composed a song entitled “Let it End” and obtained a copyright for the composition.\textsuperscript{37} He performed the song a few times with his band in Chicago, and sent a recording along with a lead sheet to several recording and publishing companies in an attempt to obtain a record deal.\textsuperscript{38} Three of the companies (out of a total of eleven) did not return the materials to Selle.\textsuperscript{39}

A few years later, Selle heard the Bee Gees song “How Deep is Your Love” and believed it was a new version of his song, thereby prompting him to file the suit.\textsuperscript{40} Witnesses testified that when the

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\bibitem{Walsh} Walsh: No Justice for Johnson? A Proposal for Determining Substantial Si
\bibitem{2006} Published by Via Sapientiae, 2016

\textsuperscript{35} Johnson, 409 F.3d at 24.
\textsuperscript{36} Selle v. Gibb, 741 F.2d 896, 898 (7th Cir. 1984).
\textsuperscript{37} \textit{Id}.
\textsuperscript{38} \textit{Id}.
\textsuperscript{39} \textit{Id}.
\textsuperscript{40} \textit{Id}.
\end{thebibliography}
Bee Gees created "How Deep is Your Love," they were in a small studio in a remote town 25 miles from Paris, France. A tape was admitted into evidence which showed that the Gibb brothers sang or hummed the melody bit by bit to put the song together and their keyboardist played along.

The Seventh Circuit first considered whether the Gibb brothers had access to Selle's composition. If there is no direct proof of access, then access may be inferred if the works are so substantially similar that any possibility of independent creation is precluded, coupled with other types of circumstantial evidence related to access. Here, Selle's song had not been widely disseminated and was virtually unknown. In addition, there was no evidence that any of the Gibb brothers or their associates were in Chicago at the time Selle sent his recording and lead sheet to the record and publishing companies. The court determined that the dissemination of Selle's song was de minimis and there was only a bare possibility that the Gibb brothers could have gained access to Selle's song.

The court then generally considered the similarity between the two compositions, to determine if access could be inferred. Although unusual, it is possible to establish access if the works display "striking similarity." "To prove that certain similarities are 'striking,' the plaintiff must show that they are the sort of similarities that cannot satisfactorily be accounted for by a theory of coincidence, independent creation, prior common source, or any

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41. Id. at 899.
42. Selle, 741 F.2d at 899.
43. Id. at 901.
44. Id.
45. Id. at 902.
46. Id. The court quotes Testa v. Janssen, 492 F. Supp. 198, 202-03 (W.D. Pa. 1980), which explains that "while circumstantial evidence is sufficient to establish access, a defendant's opportunity to view the copyrighted work must exist by a reasonable possibility-not a bare possibility." Id.
47. Id. at 902-03. According to Black's Law Dictionary, de minimis is defined as "so insignificant that a court may overlook it in deciding an issue or case." BLACKS LAW DICTIONARY 464 (8th ed. 2004).
48. Selle, 741 F.2d at 904-05.
49. Id. at 901.
theory other than that of copying.\textsuperscript{50} It is also necessary to consider any dissimilarities that may be a blatant attempt to throw off the suspicion of infringement, as well as any departures from the norm or possible errors in the work that also exist in the allegedly infringing work.\textsuperscript{51} Here, although Selle’s expert witness said the compositions were “strikingly similar,” he did not make mention of the rather simplistic nature of pop music, or that all songs are relatively short and build on repeating patterns.\textsuperscript{52} Furthermore, the witness’s area of expertise was in classical, not pop music.\textsuperscript{53} The witness also did not discuss the possibility of prior common source.\textsuperscript{54}

On the balance of the evidence, the plaintiff did not meet the burden of proving access, or sufficient striking similarity between the works to infer access and, therefore, the court found in favor of the defendants, the Gibbs.\textsuperscript{55}

2. \textit{Bright Tunes Music Corp. v. Harrisongs}

In a separate case, the United States District Court for the Southern District of New York found copyright infringement did

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50. \textit{Id.} at 904 (quoting Jeffrey G. Sherman, \textit{Musical Copyright Infringement: The Requirement of Substantial Similarity}, Copyright Law Symposium, 22 COPYRIGHT L. SYMP. 81, 96 (1975)).

51. \textit{Id.}

52. \textit{Id.} at 905.

53. \textit{Id.}

54. \textit{Selle}, 741 F.2d at 905 ("The plaintiff’s expert witness does not seem to have addressed any issues relating to the possibility of prior common source in both widely disseminated popular songs and the defendant’s own compositions."). M. Fletcher Reynolds explains in his article, \textit{Selle v. Gibb and the Forensic Analysis of Plagiarism}, that when faced with an infringement accusation, “the defendant may claim that similarities arise because both he and the plaintiff copied from a common source. If so, then what was copied was not the plaintiff’s original expression, and the plaintiff cannot complain.” M. Fletcher Reynolds, \textit{Selle v. Gibb and the Forensic Analysis of Plagiarism}, available at http://www.musicanalyst.com/article.htm. The defense works particularly well with “cases involving musical styles that employ standard formulae,” such as pop music. \textit{Id.} Material deriving from prior common source may also include public domain works.

55. \textit{Selle}, 741 F.2d at 905-906.
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exist in *Bright Tunes Music Corp. v. Harrisongs*, although the defendant had subconsciously plagiarized.\(^{56}\) The plaintiff, Bright Tunes Music Corp., accused the defendant, George Harrison, of using the plaintiff’s music from the successful song “He’s So Fine,” even though the defendant replaced the words with his own and entitled the song “My Sweet Lord.”\(^{57}\) The court found that while the motifs present in “He’s So Fine” were not novel, their particular patterns of repetition were “highly unique.”\(^{58}\) Harrison’s piece, “My Sweet Lord,” consisted of the same melody, the same harmony, and virtually the same repetition pattern.\(^{59}\)

“He’s So Fine” had enjoyed the number one position on the Billboard charts for five weeks in the United States and was number twelve on the charts in England in 1963, one of the top hits for that year.\(^{60}\) The court reasoned that, although Harrison explained his process of creating the song as “vamping” chords and playing around with lyrics and trying out the melody and harmony with others, the songs were substantially similar.\(^{61}\) Indeed, they were the very same song, but with different lyrics.\(^{62}\) Thus, infringement had occurred.\(^{63}\) No doubt Harrison had access to “He’s So Fine” as it was a widely popular song, and most likely he could not have avoided it.\(^{64}\)

The court did not believe, however, that Harrison intentionally plagiarized “He’s So Fine.”\(^{65}\) The court explained that most likely,


\(^{57}\) *Id.* at 178-79. “He’s So Fine” was composed by Ronald Mack, and first recorded by the “Chiffons” in 1962. *Id.* at 178. Bright Tunes Music Corp. holds the copyright to the recording. *Id.* “My Sweet Lord” was composed by George Harrison and was recorded in 1970 by Billy Preston. *Id.* at 178-79.

\(^{58}\) *Id.* at 178.

\(^{59}\) *Id.* (noting that in Harrison’s version, the A motif is repeated four times, followed by the B motif repeated three times (“He’s So Fine” repeated the B motif four times), followed by a transitional passage of the same length).

\(^{60}\) *Id.* at 179.

\(^{61}\) *Id.* at 179-81.

\(^{62}\) *Bright Tunes Music Corp.*, 420 F. Supp. at 180-81.

\(^{63}\) *Id.*

\(^{64}\) *Id.* at 179-81.

\(^{65}\) *Id.* at 180.
in the process of playing around with chords and melodies, Harrison came upon the same as those found in “He’s So Fine,” and believed the sound would be successful.66 “His subconscious knew it already had worked in a song his conscious mind did not remember.”67 The Southern District of New York held that copyright infringement “is no less so even though subconsciously accomplished,” and found that Harrison had infringed the copyright.68

3. Recent Infringement Suits

More recently, well known singers and groups such as Mariah Carey, Destiny’s Child, Babyface, Juvenile, and Trent Reznor have all been involved in claims of copyright infringement.69 In Swirsky v. Carey, the Ninth Circuit reversed the district court’s grant of summary judgment for the defendant, Mariah Carey, holding that a triable issue of substantial similarity between the plaintiff’s and the defendant’s songs did exist.70 There, the plaintiff alleged that the chorus section and piano introduction to Mariah Carey’s song, “Thank God I Found You,” infringed his song, “One of Those Love Songs.”71 The plaintiff’s expert witness found various similarities between the two choruses such as shape, pitch, similar basslines, chord changes, tempo, overall emphasis on the same musical notes, and that both were sung in the same key.72 The Ninth Circuit criticized the lower court for failing to examine the compositions as a whole, and placing too little emphasis on the

66. Id.
67. Id.
70. Swirsky, 376 F.3d at 843.
71. Id.
72. Id. at 845.
expert witness’s testimony. 73 The district court examined the pieces on a “measure-by-measure comparison of melodic note sequences.” 74 There is much more to a musical composition than mere pitches. 75 If substantial similarity depended only on a comparison of the specific pitches or note values, expert testimony would be wholly unnecessary. 76

Conversely, in Toliver v. Sony Music Entertainment, Inc., the Alaska District Court did not find substantial similarity between the plaintiff’s work, “Independent Lady,” and a song recorded by Destiny’s Child entitled “Independent Women (Part I),” despite the fact that the defendants did have access to the plaintiff’s work. 77 The court rejected every argument the plaintiff made regarding similarity between the two works, primarily because the parts she claimed were infringed were non-protectable elements. 78 The songs tell different stories – the plaintiff’s song is about a woman who ends her relationship with a specific man, while the defendant’s song is about a woman who has “casual sexual relations” with no particular man. 79 The defendant’s song does not mention ending a relationship, and it is directed at men in general. 80 Moreover, the theme of “independence” in music is neither novel nor original in music history. 81

73. Id. at 847-49.
74. Id. at 847.
75. See id. at 847-49.
76. Swirsky, 376 F.3d at 848.
77. Toliver, 149 F. Supp. 2d at 919.
78. Id. at 915-19. The court explains that material such as subject matter (a warning to men not to control the narrator), setting (narrator’s “world”), use of the word “destiny” are not protectable. Id. at 917-19. The court humorously mentions in a note that “[i]f Plaintiff feels she is due royalties for the trio’s use of a single word, one can only imagine how Peter Cetera feels about Plaintiff’s use of the entire phrase “after all that we’ve been through,” a key element in the chorus of two of his hit songs.” Id. at 919. The court also discredits the plaintiff’s claim that the structure of the works are the same – although both pieces ask questions in the lyrics, plaintiff’s piece contains only one question and is more rhetorical than defendant’s. Id. at 917.
79. Id. at 916.
80. Id.
81. Id. at 917 (referencing “Take Back Your Mink,” another song about a financial independent woman by Frank Loesser from the Broadway musical
In the same vein, songwriters unsuccessfully attempted to show copyright infringement in Moore v. Columbia Pictures Industries, Inc., et al., Onofrio v. Reznor, et al., and Positive Black Talk, Inc., et al. v. Cash Money Records. In each of these cases, the courts found either that the plaintiffs had not met their burden of proving reasonable access, as opposed to a "bare possibility" of access, to their works, or that no substantial similarity existed between the pieces. For example, in Moore, the plaintiff claimed that the defendants, Columbia Pictures Industries, Inc., infringed his song, "She Can't Stand It," when they used a similar sounding song, "On Our Own," as the theme song to the movie Ghostbusters II. While the plaintiff established access to his work, the defendants' four expert witnesses testified that any similarity between the works was a result of the songs both falling in the "R&B/hip-hop" genre. Moore's witness, however, was not familiar with the hip-hop genre and could not contradict the testimony. Furthermore, the plaintiff's witness admitted that it was possible the defendants had not copied from the plaintiff's work. In Onofrio, the plaintiff accused the defendant, Trent Reznor, of copying material from three of his original songs, which were included on a demonstrational digital audio tape the plaintiff had sent to the

“Guys and Dolls”).

83. Selle v. Gibb, 741 F.2d 896, 902 (7th Cir. 1984) (explaining “while circumstantial evidence is sufficient to establish access, a defendant’s opportunity to view the copyrighted work must exist by a reasonable possibility – not a bare possibility.”).
84. Moore, 972 F.2d at 941-46; Onofrio, 2000 U.S. App. LEXIS 2835 at *2-5; Positive Black Talk, 394 F.3d at 367-75.
85. Moore, 972 F.2d at 941.
86. Id. at 941, 946. Moore established access to his work because his work was created before the defendants', and he had given a tape of his music to MCA's Senior Director of Artists and Repertoire who was good friends with the defendants. Id. at 942-43.
87. Id. at 946.
88. Id.
defendant. The plaintiff failed to establish more than a "bare possibility" of access to his work. His expert witness' testimony regarding "striking similarity" between the works failed "to explain how the arrangement or combination of those unprotected elements in Onofrio's songs created an original, protectable expression, which was then copied by Reznor." Finally, in Positive Black Talk, the plaintiff claimed that the defendant's song, "Back That Azz Up," infringed their song, "Back That Ass Up." The Fifth Circuit held that the district court did not err in its jury instructions, and that the jury could have legitimately found that the "hooks" in the plaintiff's and the defendant's songs were different. In the plaintiff's song, the hook was "Back That Ass Up" and in the defendant's song it was a sample from the Jackson Five's song, "I Want You Back." Consequently, the appellate court affirmed the district court's judgment for the defendants on the issue of copyright infringement.

C. Why is Popular Music More Susceptible to Claims of Copyright Infringement than Classical Music?

Judging by the number of infringement suits filed in the pop music arena, it is natural to ask: What makes this type of music so

90. Id. at *3.
91. Id.
92. Positive Black Talk, 394 F.3d at 363-64.
93. Id. at 369-71, 374. The appellate court held that the district court did not err in the jury instructions regarding "probative similarity" because the district court gave instructions consistent with the 5th Circuit, the court offered guidance to the jury that similarity only had to exist between portions of the works rather than the whole, and because the jury found the defendant created his work independently. Id. The district court did not need to instruct that a lesser degree of similarity is required where a high degree of accessibility is established. Id. at 371-72. Nor did the district court need to specifically instruct the jury that independent creation must be found by clear and convincing evidence. Id. at 372-73. The appellate court held that the fact that the jury instructions asked whether the defendant had proved independent creation by a preponderance of evidence did not constitute plain error. Id at 372.
94. Id. at 374.
95. Id. at 383.
susceptible to infringement claims? This subsection compares the characteristics of popular music with those of classical music in order to demonstrate how popular music’s “simplistic” style may be the cause of infringement, whether intentional or subconscious, or not even infringement at all, but rather mere coincidence.

1. Popular Music Characteristics

It is difficult to provide a precise definition of exactly what pop music is. In 1990, British legislators attempted to define popular music as “all kinds of music characterized by a strong rhythmic element and a reliance on electronic amplification for their performance.”96 There were objections to this definition, principally that it was too broad.97 For the purposes of this article, I will discuss popular music as encompassing many types of contemporary genres, such as rock, rap, country, etc.98 In his essay entitled *Pop Music*, Simon Frith notes that pop music is “music produced commercially, for profit, as a matter of enterprise not art.”99 Because the music is profit driven, it must be “accessible to a general public (rather than aimed at elites or dependent on any kind of knowledge or listening skill).”100 To accomplish this, Frith explains that “pop is about giving people what they already know they want rather than pushing up against technological constraints or aesthetic conventions,” unlike classical music where composers allow their creativity to guide the expression of the music, the result of which is often shocking to the public (e.g. Igor Stravinsky’s *The Rite of Spring*).101 In order to appeal to the

97. Id.
98. Id at 94.
100. Id.
101. Id. at 96; Stravinsky’s *The Rite of Spring* debuted in Paris, France, in 1913 and:

...gave rise to one of the great theatrical scandals of all time. Even during the orchestral introduction mild protests against the music could be heard. When the curtain rose the audience became exacerbated by Nizhinsky’s choreography as well as
general public, pop music attempts to identify with the listener by “express[ing] commonplace feelings – love, loss, jealousy,” rather than “realizing individual visions or making us see the world in new ways.”  

Pop music is generally vocal in nature and the themes are easy to recall and understand. Additionally, pop music appeals to the masses because of its repetitious form, loud dynamics, and accented rhythm. The music is short in duration (the average song is less than three minutes), and characterized by a single melody with a simple harmony accompaniment. Pop music is geared toward young people, fostering audience interaction, loud enthusiasm and applause as appropriate gestures throughout performances. The radio-play lifespan of pop music is generally very short, usually only from six to ten weeks. As a result, the appeal must be immediately ascertainable. Finally, because pop music is market oriented, there is little variation between songs in the same genre. 

Stravinsky’s music, and protests and counter-protests multiplied. At times the hubbub was so loud that the dancers could not hear the music they were supposed to be dancing to . . . to those present on the first night the riot in the theatre was a traumatic experience.


102. FRITH, supra note 96, at 96. Consumers continue to shell out money to purchase music they believe speaks directly to them, without realizing (or maybe not caring) that pop music themes are akin to horoscopes – so general they could apply to anyone. Id. Frith says “[t]his is the paradox of pop that Noel Coward described as the ‘potency’ of cheap music. Id. We can and do despise pop music in general as bland commercial pap while being moved by it in particular as a source of sounds that chime unexpectedly but deeply in our lives.” Id

103. MARIANNE WILLIAMS TOBIAS, CLASSICAL MUSIC WITHOUT FEAR: A GUIDE FOR GENERAL AUDIENCES 16 (2003).

104. Id.


106. TOBIAS, supra note 103, at 16.

107. Id.

108. COOPER, supra note 105, at 4.

109. Id.

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formula or pattern that makes money in the market, they stick with it.

2. Classical Music Characteristics

Classical music, in direct contrast to pop music, is first and foremost art. Its primary goal is not to entertain. It is "music of the European tradition marked by sophistication of structural elements." One of the principal differences between classical music and pop is that pop music lacks the development of themes, which is a central feature of classical music. Music critic Tim Smith explains:

Typically, the pop music composer is finished after creating a tune with chords (harmony) underneath it. By contrast, the classical composer's task is far from over with the writing of a melody or a chord or a rhythmic pattern; that's only the beginning. The classical composer is interested in developing the full potential of the melodic and harmonic ideas.

Several themes may be present within a single movement, and

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111. SMITH, supra note 110, at 1.
113. SMITH, supra note 110, at 3-4.
114. Id. at 3.
115. Movement can be described as:
[a]ny self-contained and thus at least potentially independent section of a larger work such as a sonata, symphony, concerto, string quartet, suite, cantata, oratorio, or even Mass. In performance, successive movements are usually separated by a brief pause (during which the audience customarily does not applaud). Composers occasionally specify, however, that a movement is to succeed another without pause . . . , as in the
each one will be explored in depth.\textsuperscript{116} Smith explains that one of the goals of classical music is "to present themes that [have] contrasting characteristics and get them to interact with each other as the development process unfold[s]."\textsuperscript{117}

The detailed and complex nature of the classical development is perhaps most apparent in the baroque\textsuperscript{118} fugue.\textsuperscript{119} Fugues are polyphonic\textsuperscript{120} works, and involve many musical lines (called voices) that overlap.\textsuperscript{121} The result may appear to be chaos – like walking into a party with many conversations taking place at once.\textsuperscript{122} Once examined, however, the fugue is actually highly logical and organized.\textsuperscript{123} Themes may be inverted, played in retrograde, fragmented, inverted, transposed,\textsuperscript{124} and played in sequence,\textsuperscript{125} among others.\textsuperscript{126} The voices are layered and play off

fourth movement of Beethoven's Fifth Symphony.

\textbf{HARVARD DICTIONARY OF MUSIC, supra} note 110, at 533.

\textsuperscript{116} \textbf{SMITH, supra} note 110, at 4.

\textsuperscript{117} \textit{Id.}

\textsuperscript{118} \textbf{TOBIAS, supra} note 103, at 22. Musical era spanning 1600-1750. Originally carrying a pejorative connotation, baroque implied that the music "was distorted or overblown and strange." \textit{Id.}

\textsuperscript{119} Fugue can be described as "[t]he most fully developed procedure of imitative counterpoint, in which the theme is stated successively in all voices of the polyphonic texture, tonally established, continuously expanded, opposed, and reestablished." \textbf{HARVARD DICTIONARY OF MUSIC, supra} note 110, at 336.

\textsuperscript{120} Polyphonic is defined as "[m]usic that combines several distinct melodic lines simultaneously . . . ." \textit{Id.} at 669.

\textsuperscript{121} \textbf{TOBIAS, supra} note 103, at 29-30.

\textsuperscript{122} \textit{Id.} at 29.

\textsuperscript{123} \textit{Id.}

\textsuperscript{124} Transposition is defined as "[t]he rewriting or performance of music at a pitch other than the original one. This entails raising or lowering each pitch of the original music by precisely the same interval." \textbf{HARVARD DICTIONARY OF MUSIC, supra} note 110, at 904.

\textsuperscript{125} Sequence is defined as:

\textit{[t]he repetition of a phrase of melody (melodic sequence) and or a harmonic progression (harmonic sequence) at different pitch levels, the succession of pitch levels rising or falling by the same or similar intervals. In a melodic sequence (as distinct from *imitation), the repetition occurs within a single voice. A melody may be transposed exactly, retaining its precise interval content and thus probably effecting a change of key, or the sequence may proceed diatonically, the melody
each other to create a thick texture.\textsuperscript{127} Fugal harmonies are created as melodies are layered and interwoven.\textsuperscript{128} In other words, each note that is played in a single voice becomes the harmony of the other voices that are played simultaneously.

Tim Smith gives the example of Beethoven's Fifth Symphony to demonstrate how classical composers could take a short, simple, theme and develop it into something magnificent.\textsuperscript{129} The opening "da-da-da-DUM" is nearly universally recognized and "appears in an incredible variety of ways throughout not only the opening movement, but the remaining three movements, like a kind of motto or a connective thread . . . Beethoven keeps finding fresh uses for his motto . . . ."\textsuperscript{130} Similarly, Smith explains, "In a work like the \textit{Variations on a Theme of Haydn}\textsuperscript{131} by Johannes Brahms, we can hear the composer dissect a single tune of several measures' duration, examine it from every harmonic and rhythmic angle, and put it back together."\textsuperscript{132} The listener must be actively engaged in order to understand the complexities of the development process. The classical composer helps the listener to stay focused by bringing back common themes. In the event that the listener becomes lost during the development, even in the most highly developed pieces, the music guides him back to the main

\begin{footnotesize}
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\item retaining only its general contour and remaining in the same key. Many sequences mix the two procedures. . . .
\item \textit{Harvard Dictionary of Music}, supra note 110, at 768.
\item \textit{Id.} at 336.
\item \textit{Tobias}, supra note 103, at 29. Tobias describes texture as thick when "the music sounds heavy or if there are many lines occurring at once, as if many conversations are taking place simultaneously." \textit{Id.}
\item \textit{See Harvard Dictionary of Music}, supra note 110 (definition of counterpoint).
\item \textit{Smith}, supra note 110, at 3-4.
\item \textit{Id.} at 4.
\item \textit{Id.} at 4.
\item \textit{Smith}, supra note 110, at 4.
\end{itemize}
\end{footnotesize}
path by returning to familiar material.

Unlike pop music, the classical composer has many more musical structures to choose from when creating a piece.133 On the instrumental side, composers may choose to write a round, canon, fugue, sonata, suite, symphony, minuet and scherzo, rondo, theme and variations, concerto, overture/ode, or tone poem/symphonic poem.134 Vocal musical structures include the cantata, oratorio, mass, requiem, or passion.135 Classical themes are longer than pop themes, and a single work may include many of them, unlike pop, which typically has one.136 Dynamics are varied and range from extremely quiet to extremely loud, unlike pop music, which is often static.137 The texture138 of pop music is generally homophonic,139 However, classical music can be either monophonic,140 polyphonic, or homophonic.141 While the tempo in pop music is usually the same throughout, classical music tempo may change within a single movement or between movements.142 There is little or no audience interaction with the performers, and the audience is quiet during the performance, unlike the pop music

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133. Id. at 53-76. It should be noted that particular structures were more popular in certain musical eras than others, and not all musical structures have been in existence for the same length of time.

134. Id. at 53-71.

135. Id. at 71-76.

136. TOBIAS, supra note 103, at 17.

137. Id.


139. Homophony is defined as “[m]usic in which melodic interest is concentrated in one voice or part that is provided with a subordinate accompaniment, as distinct from *polyphony, in which melodic interest is distributed among all of the parts of the musical texture.” HARVARD DICTIONARY OF MUSIC, supra note 110, at 394.

140. Monophony is defined as “[m]usic consisting of a single line or melody without an accompaniment that is regarded as part of the work, itself... as distinct from *polyphony and monophony.” Id. at 526.

141. TOBIAS, supra note 103, at 17.

142. Tempo is defined as “[t]he speed at which music is performed... Most pieces have a range of acceptable tempos...” HARVARD DICTIONARY OF MUSIC, supra note 110, at 873.
performance.\textsuperscript{143}

3. \textit{Pop Music Infringement Claims are Attributable to Its Musical Characteristics}

After comparing the characteristics of pop and classical music, it is apparent that pop music employs much simpler techniques. When pop music songwriters follow the "rules" of pop composition, they have fewer techniques to choose from than classical music composers. Pop music "is literally one-dimensional – it has one sound, one timbre,\textsuperscript{144} one kind of material."\textsuperscript{145} It is "normative music confined to monosyllables and repetition."\textsuperscript{146} Classical music, on the other hand, "is more concerned with the \textit{process} of subjectivity than with a position statement, more interested in the process of identity formation than in the definition of any single, static identity."\textsuperscript{147}

Julian Johnson, author of \textit{Who Needs Classical Music?}, explains that unlike pop music, classical music does not depend on its surface appearance, but rather "demonstrates its inner workings like a transparent clock face."\textsuperscript{148} She further notes that classical music:

attaches less importance to the self-sufficiency of its sound world at any given moment and more to the unfolding process of the work. The music's content is not heard immediately, but rather as the product of its unfolding through time. Its discursive, temporal narrative resists the kind of listening that tries to grasp it in a single brief moment, as a physical object.\textsuperscript{149}

In other words, contrary to pop music where the information is directly handed to the listener with little explanation or

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  \item \textsuperscript{143} \textsc{tobias, supra} note 103, at 17.
  \item \textsuperscript{144} Timbre is defined as "[t]one color." \textsc{Harvard Dictionary of Music, supra} note 110, at 893. Tone is defined as "[t]he character of the sound achieved in performance on an instrument." \textit{Id.} at 899.
  \item \textsuperscript{145} \textsc{julian johnson, who needs classical music? cultural choice and musical value} 58 (2002).
  \item \textsuperscript{146} \textit{Id.} at 103.
  \item \textsuperscript{147} \textit{Id.} at 71.
  \item \textsuperscript{148} \textit{Id.} at 60.
  \item \textsuperscript{149} \textit{Id.} at 55.
\end{itemize}
clarification required, in order to understand classical music the listener must invest time and effort. The listener must be mindful of similarities and common themes the composer uses to keep the listener on track throughout the piece, while traveling down the various roads of musical development.

The lack of plagiarism, infringement, or substantial similarity among classical works may be largely attributed to this concern for highly developed themes and "unfolding" of the music. Pop music is commercially driven and therefore must appeal to the largest population possible. In order to accomplish this, the music must follow the rules and use basic musical elements to appeal to the masses. Conversely, classical music is artistically driven, and composers only need follow their own inspiration, intuition, and creative expression. "[T]he great composers didn't follow the rules, but made the rules follow them."150 The result is diversity among compositions, composers, and musical eras. Due to the slow evolution (or lack thereof) in the pop realm, and the limited number of techniques available, it is inevitable that, as more pop music is written that follows the same patterns and rules that proved successful in the past, many pieces may resemble each other and spark infringement claims.

D. How Did the Court in Johnson v. Gordon Determine Whether the Defendant Unlawfully Copied the Plaintiff’s Work?

In Johnson, the first element of the two-part test to determine whether infringement had occurred was not at issue.151 There was no dispute regarding the plaintiff’s copyright in the short version of his musical work.152 The court then had to determine whether

150. SMITH, supra note 110, at 2-3.

151. Johnson v. Gordon, 409 F.3d 12, 19 (1st Cir. 2005). The two-part test, as articulated in Feist Publications, Inc. v. Rural Telephone, first asks whether the plaintiff owns a valid copyright in the work, and then whether the defendant copied constituent elements of the work that are original. Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991). Additionally, if the plaintiff cannot prove by direct evidence that the defendant copied the plaintiff’s work, the plaintiff must prove that the defendant had access to the plaintiff’s work, and that the works are sufficiently similar. Johnson, 409 F.3d at 18.

152. Id. at 19-20. Although there was no dispute as to the plaintiff’s
there was "actual copying and actionable copying." Due to the fact that there was no direct evidence that the defendants had copied the plaintiff's work, the plaintiff needed to prove both that the defendants had access to his work, and that there was probative similarity. However, the court did not discuss whether the defendants had access to the plaintiff's work. Instead, the focus of the court's discussion was on a technical analysis of four points of similarity between the works, with the help of the plaintiff's expert witness, to determine whether probative similarity existed.

The court considered pitch by pitch whether a particular melody was similar between the pieces, and even after applying the musical techniques of retrograde, inversion, and transposition, the melodies were still not similar. The rhythm would have had to be changed and pitches altered and others added. The plaintiff's own witness noted that the resulting melodic contour was common and appeared in many songs, including "Row, Row, Row Your Boat." The court determined that a two-chord harmonic progression was not protectable because the progression "is a stereotypical building block of musical composition" and "lacks copyright in the short version, the defendants argue that the longer version of plaintiff's work did not have a registered copyright, and therefore any similarities between the defendants' work and the longer version of the plaintiff's work were not at issue in this proceeding. Id. at 19. The court disagreed with plaintiff's argument that the longer version received copyright protection, according to G. Ricordi & Co. v. Paramount Pictures, 189 F.2d 469 (2d Cir. 1951), because portions of the version were derived from the short version. Id. The court held that "elements distinct to an unregistered work cannot draw protection from a registered work even though the latter may contain the seminal idea that inspired both works." Id. at 20. The court dismisses the plaintiff's claim of infringement with regards to four elements that appear in the plaintiff's longer version only. Id.

153. Id. at 20.
154. Id.
155. See Johnson, 409 F.3d 12.
156. Id.
157. Id. at 21.
158. Id.
159. Id. at 22.
originality." In another melodic instance, the court found that the similar notes were "simply a coincidence," and that the other notes in the melody were "wholly dissimilar." Finally, the court found that the use of the words "you're the one for me" in both works is common to many songs, and that the "lyric is too trite to warrant copyright protection." The court concluded, based on the analysis, that there was not sufficient evidence of probative similarity to establish an inference of actual copying.

The second step in determining infringement involves ascertaining the level of "substantial similarity" between the plaintiff's and the defendants' works. The Johnson court noted that the "ordinary listener" test is appropriate to gauge substantial similarity. According to this holistic approach, substantial similarity exists "if an ordinary person of reasonable attentiveness would, upon listening to both, conclude that the defendant unlawfully appropriated the plaintiff's protectable expression." Although the works may have differences, they may still be substantially similar if "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard [the works'] aesthetic appeal as the same."

The Johnson court did not undertake a thorough analysis regarding whether the works were substantially similar, presumably because the alleged infringement did not pass the first step, proving actual copying. The court did mention in footnote six of the opinion that it does not believe the musical segments would sound alike to the ordinary listener, and that the plaintiff's expert witness agreed, but that is the extent of the substantial similarity discussion in this opinion.
III. Analysis

A. Did the Johnson Court Use the Right Test?

Clearly, the plaintiff in Johnson was frustrated by the court's analysis and comparison between the two works. The plaintiff accused the court of "hyper-dissection" and "overlooking the forest for the trees." He complained that the court considered musical fragments too small to demonstrate similarities that would have been evident in a wider context, and also criticized the court for failing to listen to the two works (although the court does not explicitly admit to this). While a note by note comparison and analysis of relevant patterns is necessary to a determination of copying, it does raise the question: when does technical comparison go too far? Is it fair to ignore the ordinary observer test when the requirements of actual copying cannot be met? Undoubtedly, a musician, whose purpose is to create music for listening pleasure, would feel cheated if the trier of fact made a determination on his copyright infringement claim without so much as listening to the piece in question. Should the substantial similarity question precede the actual copying test, if for no other reason than to consider all relevant aspects of a musical composition and promote trust in the judicial system by musicians, despite the inevitable issues of increased time and cost of the proceedings? And if so, which test is appropriate to determine substantial similarity?

B. What Problems Does Substantial Similarity Present?

One of the leading authorities on copyright infringement is Feist Publications, Inc. v. Rural Telephone. In that case, the Supreme Court articulated a two-part test to determine whether copying had occurred: 1) the plaintiff must own a valid copyright in the work, and 2) the defendant must have copied constituent elements of the

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168. Id. at 25.
169. Id. at 25-26.
work that are original. The first part is generally not the subject of dispute, as "a certificate of copyright constitutes prima facie evidence of ownership and originality of the work as a whole." The second part involves two steps. First, the plaintiff must "prove that that the defendant copied the plaintiff's work as a factual matter (either directly or through indirect evidence)." If direct evidence of copying is unavailable, the trier of fact may infer copying has occurred if the plaintiff proves that the defendant had access to the plaintiff's copyrighted work, and "that a sufficient degree of similarity," also known as "probative similarity," exists between the two works. Second, the plaintiff must show "that the copying of copyrighted material was so extensive that it rendered the infringing and copyrighted works 'substantially similar.'" There are a variety of methods available to determine 'substantial similarity,' and which method to use will depend on the circuit and the circumstances of the case.

The substantial similarity inquiry presents many problems. First, formulating a precise definition of substantial similarity has been unsuccessful. "It is a phrase that, instead of becoming more understood with each judicial interpretation, has become more ambiguous." The Second Circuit attempted to define the test for substantial similarity in Ideal Toy Corp. v. Fab-Lu Ltd. as "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." One commentator has pointed out, however, that this definition excludes the use of expert witness testimony, and relies solely on

171. Id.
172. Johnson, 409 F.3d at 17.
174. Johnson, 409 F.3d at 18; see also Lotus Dev. Corp., 49 F.3d at 813.
175. Segrets, 207 F.3d at 60; see also Lotus Dev. Corp., 49 F.3d at 813.
178. Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966).
the ordinary observer test. Professor Melville Nimmer explained that:

slight or trivial similarities are not substantial and therefore non-infringing. But it is equally clear that two works may not be literally identical and yet, for purposes of copyright infringement, may be found to be substantially similar . . . The problem, then, is one of line drawing. Somewhere between the one extreme of no similarity and the other of complete and literal similarity lies the line marking off the boundaries of “substantial similarity.”

Furthermore, Judge Learned Hand noted that “wherever [the line] is drawn will seem arbitrary.” A comparison which allows the trier of fact to mark boundaries where he feels it is appropriate is dangerous and a potential accelerator to the flames of injustice. Additionally, lack of a clear definition of substantial similarity leaves musicians clueless as to whether similarities between their work and another’s are substantial enough to constitute wrongdoing.

Second, use of the term substantial similarity as an element of a copyright test that also includes elements of probative similarity and striking similarity is confusing not only for the courts, but for the parties involved. According to the standard copyright infringement test, the plaintiff must own a valid copyright in the work and prove that the defendant copied original elements of that work, which may be demonstrated by direct or circumstantial evidence. The two step process for demonstrating circumstantial evidence of copying is to show that the defendant had access to the plaintiff’s work and that probative similarity (“sufficient degree of

180. 4 NIMMER, supra note 176, § 13.03[A].
181. Id.
182. Feist Publ’ns, Inc., 499 U.S. at 361; Segrets, Inc., 207 F.3d at 60.
similarity”) exists between the works. A similarity, which may or may not be substantial, is probative of copying if, by definition, it is one that under all circumstances establishes an inference of copying. Even if evidence of access is lacking, this test may still be satisfied if there is striking similarity between the two works. If the test to prove that the defendant copied the plaintiff’s work as a factual matter is satisfied, then the plaintiff must show that the works are substantially similar as a result of extensive copying. Essentially, each step to determine whether copyright infringement has occurred involves considering varying degrees of similarity between the works, but with no indication of where the line is drawn between probative similarity, striking similarity, and substantial similarity. Additionally, some courts use the term “substantial similarity” when discussing “probative similarity.” This interchange of terms only adds to the confusion.

Third, it is unclear as to how much similarity between the works constitutes substantial similarity. Nimmer has stated that “it is clear that slight or trivial similarities are not substantial and are therefore noninfringing.” Nimmer also explains that the amount of similarity depends on the circumstances. Only the creative original aspects of a work are protectable, so it would make sense that “more similarity is required when less protectable matters are at issue.” Nevertheless, an arbitrary line must be drawn at some point.

Fourth, several tests exist to determine substantial similarity, and a finding of copyright infringement may depend on which test the court uses. Moreover, “courts are often confused regarding

183. Johnson, 409 F.3d at 18; see also Lotus Dev. Corp., 49 F.3d at 813.
185. Mohler, supra note 179, at 978.
186. Segrets, 207 F.3d at 60; see also Lotus Dev. Corp., 49 F.3d at 813.
187. Fruehwald, supra note 184, at 29.
188. 4 NIMMER, supra note 176, § 13.03[A].
189. Id.
190. Id.
191. Id.
192. Mohler, supra note 179, at 971.
which test to apply" and "the tests are inconsistently applied, or often misapplied." The four main tests courts employ to determine whether substantial similarity exists between two works are the "abstractions test," the "pattern test," the "total concept and feel test," and the "dissection test."\(^{194}\)

The abstractions test is attributed to Judge Learned Hand, who first suggested it in *Nichols v. Universal Pictures Corp.*\(^ {195}\) The test involves breaking the work into levels of expression by abstracting "more and more of the incident" or, in other words, gradually abstracting parts of the plot.\(^ {196}\) The first level is an identical copy of the work, and the "last may perhaps be no more than the most general statement of what the play is about."\(^ {197}\) Somewhere between the two extremes lies the line that divides infringement from noninfringement.\(^ {198}\)

When applying the pattern test, the trier of fact extracts the significant characters and events in the copyrighted work that make up that work's "pattern."\(^ {199}\) The trier of fact then compares the pattern with the allegedly infringing work to determine whether the same pattern exists, in which case the works are deemed to be substantially similar.\(^ {200}\)

Under the total concept and feel test, the court considers the work as a whole, including the protectable and the unprotectable aspects.\(^ {201}\) The test involves two steps: "an 'extrinsic test' to determine similarity in general ideas, and an 'intrinsic test' to compare the particular expression used."\(^ {202}\) Nimmer notes that

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193. *Id.* at 972.
194. See *id.* at 980-988; see also 4 NIMMER, supra note 176, § 13.03[A].
196. *Id.* at 981 (quoting Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930)).
197. *Id.* at 981-82 (quoting Nichols, 45 F.2d at 121).
198. *Id.* at 982.
199. See 4 NIMMER, *supra* note 176, § 13.03[A][1][b].
200. *Id.* Nimmer makes a comparison between "Romeo and Juliet" and "West Side Story". He finds 13 points of similarity between the two works, concluding that the overall pattern is common to both works, and thus, the works are substantially similar. *Id.*
202. 4 NIMMER, *supra* note 176, § 13.03[A][1][c]; see Sid & Marty Krofft Television Prod. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977).
"analytic dissection and expert testimony are appropriate" for the extrinsic test, but that the intrinsic test relies "on the response of the ordinary reasonable person."203 This test works well with highly simplistic works, such as children's books, where a pattern analysis would prove unhelpful.204

The dissection test requires that the protected and unprotected elements of the works be dissected and separated.205 Copyright infringement will only be found if there is substantial similarity between the protected elements, rather than the entire work, as seen in the total concept and feel test.206 This test is different from the abstraction test because, rather than gradually peeling back layers of expression so that the result is a spectrum of expression with the identical copy at one end, and the bare idea on the other, expression and the ideas are separated from the beginning in the dissection test.

Each of these tests are flawed and has been met with criticism. The abstraction test has been found to offer little guidance and is "of no value in determining how much similarity of expression is substantial, and therefore infringing."207 The test does not determine whether infringement has occurred, but rather whether

203. 4 NIMMER, supra note 176, § 13.03[A][1][c] (quoting Krofft, 562 F.2d at 1164).
204. Id. Nimmer explained that in 1976, the Second Circuit employed the "total concept and feel" test when considering the similarity between two juvenile books. Id. "We must first note that both stories, intended for children, are necessarily less complex than some other works submitted to pattern analysis. Therefore, in addition to the essential sequence of events, we might properly consider the 'total concept and feel' of the works in question." Id. (quoting Reyher v. Children's Television Workshop, 533 F.2d 87, 91 (2d Cir. 1976)). Likewise, in Sid & Marty Krofft Television Productions v. McDonald's Corp., the Ninth Circuit used the test to determine that the characters of a children's television show, H. R. Pufnstuf, were substantially similar to characters used in McDonald's restaurant advertisements. Krofft, 562 F.2d at 1164-67. The court focused more on the intrinsic analysis because both works were directed at children, and found that McDonald's had "captured the 'total concept and feel' of the Pufnstuf show." Krofft, 562 F.2d at 1166-67.
205. Mohler, supra note 179, at 987.
206. Id.; see also Matthews v. Freedman, 157 F.3d 25 (1st Cir. 1998).
the copying was that of expression or ideas.\textsuperscript{208} The pattern test is not helpful for works that do not have a pattern, such as paintings, sculpture, and characters.\textsuperscript{209} While the test may assist in determining the substantial similarity between two literary works, there are few other areas where the test would be applicable.\textsuperscript{210} The total concept and feel test is criticized because when protection is granted for the work in its entirety, ideas and other unprotectable elements may receive protection along with the original and expressive elements of the work, contrary to the goals of copyright law.\textsuperscript{211} In his Comment, Jarrod Mohler notes that “another flaw in the total concept and feel approach is that ‘concepts’ are explicitly excluded from protection in section 102(b) of the Copyright Act.”\textsuperscript{212} Furthermore, although the test may be applicable to less complex works, it is not sufficient to determine substantial similarity in “the highly technical realm of computer software.”\textsuperscript{213} Applying the dissection test runs the risk of overlooking the expressive elements of a work if the trier of fact takes the test too far.\textsuperscript{214} Mohler explains that if a song is dissected “into its component parts, such as the chord progression, the notes played, and the instrumentation, almost no popular song could be classified as ‘original.’”\textsuperscript{215} Nevertheless, as a whole, the song is composed of expressiveness and originality. Mohler asks the question, “exactly what is the proper size of the dissected pieces?”\textsuperscript{216} Is it even possible to isolate and dissect pieces from pop music, or have the component parts and the expression merged

\textsuperscript{208} Id.

\textsuperscript{209} Id. at 913.

\textsuperscript{210} Id.; see also Mohler, supra note 179, at 984.

\textsuperscript{211} Mohler, supra note 179, at 986.

\textsuperscript{212} Id. at 987; see 17 U.S.C. § 102(b) (2000).

\textsuperscript{213} Mohler, supra note 179, at 986.

\textsuperscript{214} Id. at 988; see Jane C. Ginsburg, \emph{Four Reasons and a Paradox: The Manifest Superiority of Copyright Over Sui Generis Protection of Computer Software}, 94 \textsc{Colum. L. Rev.} 2559, 2561 (1994).

\textsuperscript{215} Mohler, supra note 179, at 988; see Sarah Brashears-Macatee, Note, \emph{Total Concept and Feel or Dissection?: Approaches to the Misappropriation Test of Substantial Similarity}, 68 \textsc{Chi-Kent L. Rev.} 913, 926 (1993).

\textsuperscript{216} Mohler, supra note 179, at 988; see Brashears-Macatee, supra note 215, at 921.
as a result of pop music’s simplicity?217

The use of several tests may add to the confusion over how to determine whether one work has infringed upon the copyright of another. Due to the fact that creative expression is embodied in numerous mediums, however, all of which may acquire copyright protection, it may be necessary for courts to have various tests available to allow application of the best fitting test on a case-by-case basis. For example, in Johnson, if the abstractions test had been applied to determine whether the defendant’s song infringed upon the plaintiff’s, the court would have had to abstract “more and more of the incident” from the works, and compare them for similarities.218 While this test may fit well with works that tell a story, where gradually bits of the plot are left out, it raises confusing questions as applied to pop music. What constitutes the “incident” in pop music? Musical phrases? Notes? The Johnson court would have run into similar problems had they used the pattern test. What musical elements could be considered part of the pattern? The musical form? Key? Harmony? Phrases? The dissection test would likewise have been difficult to apply because the protectable and nonprotectable elements would need to be separated. In music, however, the two are often inseparable. For example, individual notes and sometimes several notes played in common patterns such as an arpeggio do not receive copyright protection, but the larger phrase that contains them is protected. The total concept and feel test, which considers the work as a whole seems to fit the best with pop music, and appropriately, was the test applied in Johnson.

Undoubtedly, the vague tests and definitions are unfair to composers at the time of creation because they do not have notice of what constitutes infringement. The drawing of an arbitrary line will most likely leave musicians angry and feeling as though they were treated unfairly at trial. They may also still be confused as to what might constitute infringement in the future, as is evident in Johnson by the plaintiff’s final arguments, namely, his complaints of the court “hyper-dissecting” the musical works, and that the

217. See Mohler, supra note 179, at 988.
218. Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).
court did not listen to the works.\textsuperscript{219} The lack of clear guidelines may lead to a decline in music production and have a chilling effect on the music industry.

If infringement is found too easily, authors will create less for fear of infringing upon the works of another author, thus giving the public less than the desired access to works. If infringement is not found easily enough, authors will not be motivated to create because of the potential for insufficient reward.\textsuperscript{220}

While it has been pointed out that each new test only creates more confusion,\textsuperscript{221} the current inadequate methods for determining substantial similarity are an injustice to consumers and the creative community who are unsure of acceptable practices and run the risk of being labeled as thieves.

C. Should the Test for Substantial Similarity Depend on the Type of Work at Issue?

Sarah Brashears-Macatee suggests in her Comment that the test used to determine whether two works are substantially similar should vary according to the type of work at issue, e.g. visual, musical, and literary works.\textsuperscript{222} She states that when considering visual works, the dissection test and the total concept and feel test are appropriate, the latter test to be used with “more creative abstract visual works, such as a fabric design or a fantasy-land character.”\textsuperscript{223} With regards to literary works, the total concept and

\begin{itemize}
  \item \textsuperscript{219} Johnson, 409 F.3d at 25-26.
  \item \textsuperscript{220} Sharb, supra note 207, at 906.
  \item \textsuperscript{221} Mohler, supra note 179, at 998.
  \item \textsuperscript{222} Brashears-Macatee, supra note 215, at 923.
  \item \textsuperscript{223} Id. at 923-26. Brashears-Macatee explains that the court in Aliotti v. R. Dakin & Co., a case involving alleged infringement of a stuffed dinosaur design, acknowledged that:

  \begin{quote}
  \textquote{[t]o the extent that it is necessary to determine whether similarities result from nonprotectable expression, it is appropriate under Krofft’s intrinsic test to perform analytic
  \end{quote}
\end{itemize}
feel test is less helpful.\textsuperscript{224} Because literary works are expressed through language, "precise verbal descriptions of similarity [between the works] are possible," and a test which considers "concept and feel" is inadequate.\textsuperscript{225} Moreover, "the plot . . . or gist of an entire work is no doubt in the public domain."\textsuperscript{226} Additionally, problems may arise when the defendant has copied from the plaintiff's work a small, but significant amount of material.\textsuperscript{227} The defendant is still liable, although the works would not necessarily have the same "concept and feel."\textsuperscript{228} The dissection test also presents a problem — "if single works are not copyrightable, at what level do groups of words become copyrightable?"\textsuperscript{229} In other words, if nonprotectable words are extracted from a literary work, there is nothing left to be protected.\textsuperscript{230} Dissection is necessary, however, when considering non-fiction works.\textsuperscript{231} Because non-fiction works are factual, it is necessary to dissect the nonprotectable elements and examine whether the remainder can be protected.\textsuperscript{232} The pattern test or

\textsuperscript{224} Id. at 928.
\textsuperscript{225} Id.
\textsuperscript{226} Id. at 930.
\textsuperscript{227} Id.
\textsuperscript{228} Brashers-Macatee, supra note 215, at 930.
\textsuperscript{229} Id. at 928.
\textsuperscript{230} Id.
\textsuperscript{231} Id. at 929.
\textsuperscript{232} Id.
abstractions test may provide a sufficient analysis for fiction works.\textsuperscript{233} Also, the author explains that the court in \textit{Trust Company Bank v. Putnam Publishing Group, Inc.}, a case in which the plaintiffs claimed that the defendant’s novel, “The Blue Bicycle,” infringed the plaintiffs’ copyright in “Gone With the Wind,” used the two step extrinsic/intrinsic approach to the total concept and feel test, to determine whether copying had occurred between two novels.\textsuperscript{234} Under the first part of the test, the extrinsic analysis, expert testimony was permitted and nonprotectable elements of the novels could be dissected before comparing the works.\textsuperscript{235} However, the second part of the test, the intrinsic analysis, required a true totalities approach.\textsuperscript{236}

Selecting an appropriate test for musical comparison presents difficulties because the trier of fact must consider the technicalities of composition, and also the effect on the listener. Extreme dissection “would not make sense because individual notes are not copyrightable.”\textsuperscript{237} An approach which primarily relies on the ordinary listener (essentially a totalities test) fails to acknowledge “that the aural sense of the ordinary person is undeveloped, making it difficult for most people to knowledgeably compare two musical works.”\textsuperscript{238} On the other hand,

\textsuperscript{233} \textit{Id.} at 931-33.

\textsuperscript{234} Brashears-Macatee, \textit{supra} note 215, at 933-34; Trust Co. Bank v. Putnam Publ’g Group, Inc., 5 U.S.P.Q.2d (BNA) 1874, 1878 (C.D.Cal. 1988). In \textit{Trust Company Bank v. Putnam Publishing Group, Inc.}, the plaintiffs, the rightful owners of the renewal copyright in the novel “Gone With the Wind,” claimed the defendants infringed their copyright when the defendant’s published the book “The Blue Bicycle.” \textit{Id.} at 1875. The plaintiffs argued that “The Blue Bicycle” was “a mere transposition of the characters and events from Georgia during the Civil War to France during World War II.” \textit{Id.} at 1878. “The Blue Bicycle” was originally published in France, and was very successful. \textit{Id.} at 1876 Subsequently, an English version was published and a substantial promotion campaign followed in America. \textit{Id.} The book made the best seller list, and the plaintiffs allege that the book detracted from the market for “Gone With the Wind” and that as a result they experienced irreparable hardship. \textit{Id.} at 1876-77.

\textsuperscript{235} \textit{Trust Co. Bank}, 5 U.S.P.Q.2d at 1878.

\textsuperscript{236} \textit{Id.}

\textsuperscript{237} \textit{Id.} at 926.

\textsuperscript{238} \textit{Id.} at 927 (citing Raphael Metzger, \textit{Name that Tune: A Proposal for an
[a]lterations, which might sound impressive when described verbally in technical jargon, may not greatly affect how the works reaches the ear. Thus, even if the extrinsic test appears to indicate that a number of similarities exist between two works, the works may not sound alike. If the works don’t sound alike, holding a defendant liable for infringement would seem unwise.239

Essentially, if the works do not sound alike, the defendant presumably added enough new material and expression to the work to make it original, and liability for infringement is unfair. However, some might say that if the defendant copied anything at all he is liable for copyright infringement.240

Attorney Raphael Metzger has proposed the “La Rue” test to determine misappropriation in musical works.241 This test involves dissection of compositional elements (rather than individual notes) such as sound, harmony, melody, rhythm, and a determination of similarity by the trier of fact, with the aid of music experts.242 The trier is educated as to compositional elements in the public domain and those common to many musical works.243 This approach appears to merge the extrinsic and intrinsic tests and “may alleviate the problems inherent in the lay hearer test: untrained ears searching for similarities in probably the least tangible of all the arts.”244

The notion that a single test for substantial similarity in copyright infringement cases is inappropriate makes sense considering that artistic mediums can differ greatly. At the risk of

Intrinsic Test of Musical Plagiarism, 5 LOY. ENT. L.J. 61 (1985)).
239. Id. at 926.
240. Michael Der Manuelian, Note, The Role of the Expert Witness in Music Copyright Infringement Cases, 57 FORDHAM L. REV. 127, 133 (1988) (discussing Judge Clark’s dissent in Arnstein v. Porter, 154 F.2d 464, 476 n.1 (2d Cir. 1946) which said that actual copying is actionable and that the degree to which the defendant used the plaintiff’s work is irrelevant).
241. Id. at 927 (citing Metzger, supra note 238, at 96-107).
242. Id.
243. Id.
244. Id.
further complicating the similarity inquiry, at least in the musical realm, a test which places more weight either on the compositional analysis or the effect on the ordinary listener may be applicable, depending on the genre of music at issue. Regarding pop songs, such as in Johnson, emphasis on the ordinary listener may have more relevance than a lengthy technical analysis for several reasons. First, as discussed in Section II(C)(1), pop music is simple, employing short melodies, basic rhythms and harmonic progressions. Because of the "limited number of notes and chords available to composers and the resulting fact that common themes frequently reappear," compounded by the lack of development of themes in pop music, compositional analysis will inevitably show similarities between the works.\textsuperscript{245}

Second, there is a question of where to draw the line between idea and expression in pop. Obviously, a single note does not constitute expression, but at what point does a grouping of notes become the composer's expression?\textsuperscript{246} In classical music, the composer generally starts with a basic theme, and then expands and develops it, resulting in complex permutations of the original theme, which undoubtedly is that composer's unique expression. In pop music, however, the theme is stated, often over and over, with no changes. Is the theme an idea or an expression? How complex must it be before it is considered the composer's expression and not public domain material?

Third, pop music depends on recognizable elements for its success. The pop music audience expects certain characteristics from the music, and a song that lacks these characteristics may not become a hit as a result of the audience being unable to identify

\textsuperscript{245} Gaste v. Kaiserman, 863 F.2d 1061, 1068 (2d Cir. 1988).

\textsuperscript{246} The question of when a group of notes constitutes the songwriter's expression is often raised with regards to musical sampling, a process by which a portion of a pre-existing song is digitally lifted from the song, or when the portion is re-recorded by musicians, and then used in the creation of a new song. See Williams v. Broadus, No. 99 Civ. 10957 (MBM), 2001 U.S. Dist. LEXIS 12894, at *2 n.1 (S.D.N.Y. Aug. 27, 2001); see generally Bridgeport Music, Inc. v. Dimension Films, 230 F. Supp. 2d 830 (M.D. Tenn. 2002), rev'd, 383 F.3d 390 (6th Cir. 2004), aff'd on reh'g, 410 F.3d 792 (6th Cir. 2005); Newton v. Diamond, 388 F.3d 1189 (9th Cir. 2004).
with the unfamiliar material. Commentator George Plasketes notes that "familiarity breeds artist convenience, consumer content and corporate capital, from record labels to radio stations to listeners and record buyers." Moreover, pop music is generally marketed toward a young, unsophisticated audience, making simplicity and connectivity between works essential.

Fourth, pop is commercially driven rather than artistically motivated. The goal of the songwriter and the record company is to make a profit. One can assume that if the works don't sound substantially similar to the ordinary listener, then one would not supplant the other in the market. In the real world, it is the consumer who decides what music he will buy, so shouldn't the consumer, i.e. the ordinary listener, play a big part in determining whether two works are substantially similar? At least in the area of pop music, a greater emphasis should be placed on the ordinary listener test than on the technical analysis.

Classical music, however, is highly complex. An expert is most likely necessary to decipher all the similarities that are hidden to the lay person. Due to the complexity of the music, similarities may be very difficult to perceive aurally by even a sophisticated listener, let alone a lay listener. In light of the intricacies of classical music, it is more likely that misappropriation has occurred when an expert can show that many compositional similarities exist between works, even in an area where works generally vary drastically from one another.

When selecting a test for determining substantial similarity in music, courts should be mindful of the goal of the composer. In classical music, the sophisticated composer will feel cheated without an in-depth technical analysis of the works. In pop music, where there is less focus on compositional techniques and more focus on profit, composers will feel cheated without a listening

247. See FRITH, supra note 96, at 96.
249. FRITH, supra note 96, at 94.
250. Id.
251. See Section II(C)(2).
comparison between the works. This is not to say that when comparing two classical works the ordinary listener test should be ignored, or that the expert analysis should be disregarded when comparing pop works. Rather, the tests should be weighed differently, on a case-by-case basis, depending on the genre of the works at issue.

D. What Would Have Been a More Appropriate Test for Johnson?

At the end of the opinion in Johnson, the court acknowledges the plaintiff’s “three last-ditch arguments” in his attempt to reverse the district court’s decision.252 I agree with two of his arguments and assume that the plaintiff was not satisfied with the appellate court’s terse dismissal of them. First, the plaintiff says that the district court “did not see the overall similarity between his song and the defendants’ song because it analyzed fragments of the two and ignored similarities that were recognizable only within a wider context,” essentially “overlooking the forest for the trees.”253 The court rejected this argument because dissection “is recognized as a valid investigative technique in copyright cases.”254 While the dissection test may be popular with several circuits, that does not mean it is the test most suited to determine the similarity between two pop songs. The court seemed to be saying that the component parts that were examined were so dissimilar that they could not possibly create an overall resemblance if considered as a whole.255 As the plaintiff argues, however, the best way to determine whether there is a resemblance of the whole is to listen to the two works, which was the plaintiff’s final argument.256 The court said there was no requirement to listen to the music, and that there was no evidence that they did not do so.257 Common sense mandates that to compare two works of music, a listening test is in order. Also, if the court had listened to the works, why would they not

253. Id.
254. Id.
255. Id.
256. Id. at 26.
257. Id.
just admit it so as to appease the plaintiff?

Two cases, Sid & Marty Krofft Television Productions, Inc. v. McDonald’s Corporation and Ideal Toy Corporation v. Fab-Lu, Ltd., demonstrate what I believe to be the appropriate analysis for substantial similarity in pop music. In Sid & Marty Krofft, the plaintiffs created a Saturday morning children’s television show called H. R. Pufnstuf.\(^{258}\) The show was about a boy named Jimmy who lived in a fantasyland with talking trees and books.\(^{259}\) McDonald’s restaurants later created an advertising campaign geared towards children, and based it on the H.R. Pufnstuf show.\(^{260}\) McDonald’s hired Krofft’s former employees to design the costumes and the set, and also used the same voices for the characters.\(^{261}\) The Kroffts filed a suit against McDonald’s alleging that the commercials infringed their copyright in the H. R. Pufnstuf show.\(^{262}\) The defendants attempted to show that their commercials were not substantially similar to the plaintiffs’ show by employing the extrinsic test, dissecting corresponding elements, and pointing out their differences.\(^{263}\) However, the court said that the intrinsic test was appropriate in this situation for two reasons. First, the court stated:

> The plaintiff’s legally protected interest in the potential financial return from his compositions [ ] derive[s] from the lay public’s approbation of his efforts. The question, therefore, is whether [the] defendant took from [the] 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 [the] defendant wrongfully appropriated something

\(^{258}\) Sid & Marty Krofft Television Prod. v. McDonald’s Corp., 562 F.2d 1157, 1161 (9th Cir. 1977).

\(^{259}\) Id.

\(^{260}\) Id.

\(^{261}\) Id.

\(^{262}\) Id. at 1162.

\(^{263}\) Id. at 1165.
which belongs to the plaintiff.  

Second, the court felt that the intrinsic test should be the focus of analysis because both of the works at issue were directed at children. "This raises the particular factual issue of the impact of the respective works upon the minds and imaginations of young people." The jury was then shown recordings of the H. R. Pufnstuf show, several thirty and sixty second McDonald’s commercials, and merchandise from both parties. The jury determined there was substantial similarity between the works and that the defendant had infringed the plaintiff’s copyright.  

Similarly, in Ideal Toy Corporation v. Fab-Lu, Ltd., the court found substantial similarity between the two toy-makers’ dolls, and determined that the defendant had infringed the plaintiff’s copyright in the doll. In that case, the plaintiff, one of the largest doll manufacturers in the U.S., created a twelve-inch teenage doll (“Tammy”), a pre-teenage sister doll (“Pepper”), and a clothing line for each doll. The defendant soon began manufacturing its own teenage doll and pre-teenage sister (“Randy” and “Mary Lou”), which were modeled after Tammy and Pepper and also had their own clothing line, and sold the dolls at a lower price than the plaintiff’s dolls. The plaintiff filed a suit for copyright infringement. The court stated that the “‘appropriate test for determining whether substantial similarity is present is whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work,’” and that the

264. Krofft, 562 F.2d at 1165 (quoting Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946)).  
265. Id. at 1166.  
266. Id.  
267. Id. at 1162.  
268. Id. at 1162-67.  
270. Id. at 239.  
271. Id.  
272. Id.  
273. Id. at 241 (quoting the Second Circuit’s articulation of the appropriate test for substantial similarity, found at Ideal Toy Corp. v. Fab-Lu, Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966), which was Ideal Toy Corp.’s appeal from the district
"copying need not be of every detail so long as the copy is substantially similar to the copyrighted work."274 The court observed that the dolls had similar faces, upturned noses, bow lips, widely-spaced eyes, slim body structures, and size.275

The court held that despite the difference between the dolls’ necks, the dolls were substantially similar under the ordinary observer test.276 “[N]ormal observation of the dolls did not at once reveal the difference in neck structure . . . “ and given the overall appearance of the dolls, it was likely that the defendant’s doll “would readily be mistaken for [the plaintiff’s] doll.”277 Such close inspection of the doll construction is akin to the extrinsic test, which the court did not believe was appropriate in this situation.278 Additionally, the court explained that when applying the ordinary observer test in this situation, children should not be excluded, as they are the doll-makers’ target market.279 Television advertisements for the dolls were aimed at children, not their parents, and the advertisements created the same impression on the children with respect to the dolls’ appearance and use for play.280

It is the youngsters who, on the basis of this impression, go to the stores with their parents or at home make their wishes known for the dolls they desire after television has made its impact upon them. In their enthusiasm to acquire . . . [the dolls] they certainly are not bent upon ‘detecting disparities’ or even readily observing upon inspection such fine details as the point at which the court’s decision to deny preliminary injunction to restrain the sale of Fab-Lu, Ltd.’s dolls, based on the claim of copyright infringement).

274. Id. at 241 n.10 (quoting Comptone Co. v. Rayex Corp., 251 F.2d 487, 488 (2d Cir. 1958)).
276. Id. at 241. Tammy and Pepper’s necks are molded to their heads, and Randy and Mary Lou’s are part of their bodies. Id.
277. Id. at 241, 242.
278. See id. at 241-42.
279. Id.
280. Id. at 242.
necks are molded.\textsuperscript{281}

Considering the cases above, it is likely that the \textit{Johnson} case was decided under the wrong test. I propose that an intrinsic analysis would have been more appropriate in \textit{Johnson} for two reasons: 1) Pop music has characteristics similar to those of children’s works, as seen in \textit{Krofft}, and toys, as seen in \textit{Ideal Toy}; and 2) Consumers buy pop music and should have a significant role in determining substantial similarity, as was the case in \textit{Ideal Toy}.

As previously discussed, pop music is designed to appeal to the masses. Consequently, the music must be simple, so songs are generally short, repetitious, and express readily identifiable emotions – love, sadness, anger, etc.\textsuperscript{282} Themes are easy to recall and understand, and characterized by a single melody over harmonic accompaniment.\textsuperscript{283} A technical extrinsic analysis is not suitable for such simple works where elements are likely to be common in many works. Pop music is targeted at young people, who most likely are listening to the music for overall general impressions. Just as a child would not identify differences between \textit{Krofft}’s and McDonald’s characters in \textit{Krofft}, and would not notice the small difference in neck molding in \textit{Ideal Toy}, people listening to pop music most likely won’t be able to notice differences between the works unless they are audibly apparent to the untrained ear. What is most important in simple works is the reaction of the intended audience. In \textit{Krofft}, the court said that the intrinsic test was appropriate because the works were aimed at children.\textsuperscript{284} Accordingly, the intrinsic test is appropriate in \textit{Johnson} because the works are aimed at young people, or in the alternative, the unsophisticated listener.

Not only is it important that substantial similarity in pop music be determined by the lay listener, but courts must also be mindful of who is included in this group. Pop music is primarily created for profit, unlike other musical forms such as classical, which are

\textsuperscript{281} \textit{Ideal Toy}, 261 F. Supp. at 242.
\textsuperscript{282} FRITH, supra note 96, at 96; TOBIAS, supra note 103, at 16.
\textsuperscript{283} TOBIAS, supra note 103, at 16.
\textsuperscript{284} \textit{Krofft}, 562 F.2d at 1165.
predominantly artistic.\textsuperscript{285} Furthermore, the Copyright Act protects the plaintiff’s right to exploit his work, and the potential profits deriving from the exploitation.\textsuperscript{286} The plaintiff’s potential profits are dependent on the lay audience’s approval of the work.\textsuperscript{287} The court in \textit{Ideal Toy} explained that “the copyright laws protect not the reputation of the copyright holder, but the commercial value of his creation.”\textsuperscript{288} The concern in copyright infringement cases is that the allegedly infringing work will supplant the original in the marketplace. Consumers decide which music they will purchase based on listening to the works, not examining the printed music or making a note by note comparison by phrases. The fact that the lay public cannot perceive a substantial similarity between the works that would affect their purchasing decision, should carry significant weight on the outcome of the case. Moreover, consumer opinion should have a place in determining misappropriation because the “purpose of the Copyright Act is not to reward authors for the authors’ sake, but to reward authors to benefit consumers and society more generally.”\textsuperscript{289}

Additionally, in \textit{Arnstein v. Porter}, where Ira Arnstein accused Cole Porter of plagiarizing several of his songs, the court found the relevant public was the “lay listeners . . . for whom such popular music [was] composed.”\textsuperscript{290} The \textit{Ideal Toy} court followed this reasoning and included children, for whom the dolls were created, in the group of lay observers.\textsuperscript{291} Consequently, pop music’s target audience, consumers consisting of young people, should be

\begin{thebibliography}{9}
\bibitem{285} Frith, \textit{supra} note 96, at 94; Smith, \textit{supra} note 110, at 1.
\bibitem{287} See Arnstein, 154 F.2d at 473.
\bibitem{288} \textit{Ideal Toy}, 261 F. Supp. at 242 (citing Arnstein, 154 F.2d at 473).
\bibitem{290} Arnstein, 154 F.2d at 467, 473.
\bibitem{291} \textit{Ideal Toy}, 261 F. Supp. at 241-42; see also Aliotti v. R. Dakin & Co., 831 F.2d 898 (9th Cir. 1987). \textit{Aliotti} involved two toy companies who both manufactured plush dinosaurs designed for children. \textit{Id.} at 899-900. The court applied the “total concept and feel test” and said that “[b]ecause children are the intended market for the dolls, we must filter the intrinsic inquiry through the perception of children.” \textit{Id.} at 902.
\end{thebibliography}
included in the group of lay listeners. Also, a problem arises when an expert witness gives his opinion as to how the lay audience might react to the works, rather than questioning actual lay audience members. It is questionable "whether an expert, highly educated in the field of music theory, analysis, and history, can in fact hear again as a lay listener," and also "whether the witness’ qualifications as a music expert establish an expertise in the aural perceptions of a lay hearer."\(^{292}\) It is also questionable whether a jury could accurately predict the lay audience’s reaction to the works.\(^{293}\) Moreover, while a jury is presumably comprised of lay listeners, it is possible that without testimony from a non-expert listener, the jury will not consider the effect of the music on the ordinary listeners. Therefore, to ensure that justice is served, ordinary non-expert listeners, in addition to expert witnesses, should be brought into court as witnesses to give their opinion as to similarity between the works.

In his dissent in Arnstein, Judge Clark warns against disregarding expert testimony in questions of substantial similarity.\(^ {294}\) His belief is that ordinary listeners are not capable of making determinations of substantial similarity between works and that if "all decisions of music plagiarism [are] made by ear, the more unsophisticated and musically naïve the better, then it seems . . . . we are reversing our own precedents to substitute chaos, judicial as well as musical."\(^ {295}\) It is true that "the unguided, possibly ‘incompetent’ ears of the factfinder may perceive as qualitatively important similarities that are not the result of copying” or vice versa, and in this regard expert testimony is necessary.\(^ {296}\) While I agree that expert opinion should not be wholly disregarded, more weight should be placed on either the expert testimony or the lay audience, depending on the genre and the purpose of the art.

How might the decision in Johnson have turned out if the intrinsic test was the focus of analysis rather than the extrinsic?

\(^{292}\) Der Manuelian, supra note 240, at 133.
\(^{293}\) Id.
\(^{294}\) Arnstein, 154 F.2d at 476-77.
\(^{295}\) Id. at 480.
\(^{296}\) Der Manuelian, supra note 240, at 146.
This is an impossible question to answer without having heard the works. Whether the intrinsic test would have led to the same conclusion or not, the point is that the court did not use the proper test for the type of music Johnson wrote. Had the court focused on the intrinsic test, Johnson would, most likely, have been satisfied with the benefit of a fair trial.

IV. IMPACT

A. Should a Uniform Analysis for Substantial Similarity Exist Among the Circuits?

The question remains whether a uniform test for substantial similarity should exist among the judicial circuits, and if so, which test should be employed? The current plethora of tests and the lack of clear guidelines has led to confusion in the courts and among artists. When an artist is granted a copyright, the work receives national protection. It seems to follow that when an issue of infringement arises involving that copyright, one national test should apply. As discussed above, however, a single test such as the total concept and feel test, the dissection test, the abstraction test, or the pattern test is not an appropriate fit with all forms of expression, such as art, music, literature, or software. The most logical solution would be to match each area with the best fitting test, and apply that test uniformly and nationally. 297

It is possible that the courts will resist a uniform test for substantiality. Jarrod Mohler discusses the similarities between attempting to formulate a strict test for substantial similarity and creating a test for prohibited obscenity as seen in Jacobellis v. Ohio. 298 In that case, the issue was whether a French film was obscene and, therefore, not protected by freedom of expression under the First and Fourteenth Amendments to the Constitution. 299

In his concurrence, Justice Stewart explained his perception of

297. See generally Brashears-Macatee, supra note 215.
freedom of expression as protecting everything except "hard-core pornography," and in his famous comment stated, "I shall not today attempt to further define the kinds of material I understand to be embraced within that shorthand description; and perhaps I never could succeed in intelligibly doing so. But I know it when I see it..." The comment has often been criticized; however, it "demonstrated that line-drawing in certain situations is futile and at some point the subjective reaction of the trier of fact must come into play." Mohler suggests that substantial similarity could be substituted for "hard-core," and that a single test for substantial similarity will not adequately protect copyrighted works. "Difficult cases can, and will, be resolved without the structure of a comprehensive test." 

While I agree that there needs to be some latitude surrounding the determination of substantial similarity, I think it is possible to arrive at a just decision while working with a single test within each realm of expression. For those areas of expression that require a more subjective inquiry, the total concept and feel test offers a balance between expert analysis and subjective opinion by the lay audience.

B. How Can Songwriters Better Protect Their Work Until a More Definitive System for Misappropriation Analysis is Created?

Until clear guidelines, or at least a uniform test, are set forth to determine misappropriation, is it possible for composers to protect their works so that an allegation of infringement doesn’t arise? First, composers must realize that artists will often borrow and build upon existing works. Composers of pop music need to be aware that due to the simple style they write in, songs are predisposed to common elements and often sound similar. There

300. Id. at 197.
301. Mohler, supra note 179, at 993.
302. Id.
303. Id.
is no misappropriation when two works express essentially the same idea. However, “this is largely because both are expressing the same idea briefly and in straightforward terms and the available variations in wording are quite limited,” as is often the case in pop music. Furthermore, because pop music is commercially driven, record companies and artists need to produce the music that consumers desire. Consumers want familiarity. A song that lacks familiarity in its opening seconds is not likely to get air time from radio programmers or attention from record company executives. “Familiarity breeds artist convenience, consumer content and corporate capital, from record labels to radio stations to listeners and record buyers.” In other words, composers need to realize that similarity between works in the same genre does not necessarily mean copying has occurred, or is even likely to have occurred, absent direct evidence of copying.

While composers are entitled to prevent unauthorized copying, they might view similarities as a tribute similar to the way classical composers have in the past. The problem is that classical music was primarily written for art, and not for commercial profit, so the common technique of “quoting” composers was easier to perceive as a compliment. Today, “quoting” other composers in the profit-driven pop world is perceived as stealing from the composer’s potential market. It seems the days when “re-creation [was] the

306. Matthews, 157 F.3d at 28. This case addresses the substantial similarity between two t-shirt designs: one which says “someone went to Boston and got me this shirt because they love me very much,” the other which states “someone whose loves me when to Boston and got me this shirt.” Id. at 26. Both phrases express the same idea, however, the expression is brief, straightforward, and the “available variations in wording are quite limited.” Id. at 28. The court explained that “even if the sentiment were original with Matthews - which is by no means clear - it would virtually give Matthews a monopoly on the underlying idea if everyone else were forbidden from using a differently worded short sentence to express the same sentiment.” Id. One can only imagine the difficulties pop music composers would face if “forbidden from using a differently worded short sentence to express the same sentiment.” Id.
308. Plasketes, supra note 248, at 137.
sincerest form of flattery” are long gone.\(^{309}\)

Alternatively, composers could follow classical and jazz examples and write more difficult and complex music, or use techniques that don’t follow traditional musical rules. As the music becomes more intricate and developed, similarities between works are less likely to be coincidental, and copying will become more obvious. The problem with writing complex music, however, is that the music does not often appeal to a wide audience. The music becomes intellectual, rather than “fun.” Pop music’s target audience generally wants to identify with simple music without having to spend too much time thinking about it. Music that diverges from the traditional path lacks the familiar elements that make pop music successful.

V. CONCLUSION

Is it conceivable that Johnson will inspire the courts to adopt a uniform analysis for substantial similarity among pop music, or any form of artistic expression? It is possible that one day the courts will recognize that the current system is confusing and produces unpredictable outcomes. But, it is unlikely that Johnson will have any effect, or at least an immediate effect, on this situation. The case is not revolutionary and it did not add anything new to the substantial similarity inquiry. Johnson is just one of hundreds of cases dealing with allegations of infringement in pop music. Even so, the influx of pop music infringement cases will hopefully cause the circuits to re-examine how they deal with the issue of substantial similarity between musical works and consider the total concept and feel test, and in particular the intrinsic analysis, when determining copyright infringement cases relating to pop music.

The current problems associated with a determination of copyright infringement, namely the confusion over terminology

\(^{309}\) Id. The author quoted from an advertisement for Duran Duran’s 1995 album, “Thank You,” covering songs from various artists. Id. Plasketes also talks about Jennifer Lopez’s 2003 video for “I’m Glad” where Lopez imitated Jennifer Beals’ dance moves in Flashdance. “Lopez considered her choreographic cover a tribute to the memorable movements.” Id.
and the inconsistent selection and application of various tests, are not going to fix themselves. Composers lack guidance as to what constitutes copyright infringement, knowledge as to which musical elements in the pop realm are considered too common to receive protection, as well as an understanding as to the meaning of substantial similarity. This will lead to more litigation over copyright issues in pop music and is an expensive use of judicial time and resources. A more appropriate system would be the application of a uniform test to each different area of expression. Until the copyright infringement analysis is reformed, songwriters could employ different techniques, such as writing more complex music or combining elements from other genres, which may prevent misappropriation, or at least make copying more obvious when it does occur. Nevertheless, composers should be mindful that in the pop realm, similarities between works are inescapable.