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Toward a Definition of Striking Similarity in Infringement Actions for Copyrighted Musical Works

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TOWARD A DEFINITION OF STRIKING SIMILARITY IN INFRINGEMENT ACTIONS FOR COPYRIGHTED MUSICAL WORKS

Federal jurists in the United States have had great difficulty formulating the appropriate standard by which to adjudicate an alleged infringement of a copyrighted musical work.[1] A plaintiff alleging copyright infringement must show ownership of a valid copyright and misappropriation of original elements of the at-issue work.[2] Proof of a valid copyright is easily met;[3] however, establishing that a defendant copied the original elements of one's musical work can be onerous and time-consuming. Courts have searched (often, in vain) for a straightforward "test" that allows plaintiffs to introduce evidence appropriate to copyright causes of action but also acknowledges the unique nature of music among the subject matter[4] covered by copyright law.[5]

Courts have defined two methods for proving substantive copying of an original work. A plaintiff may elect to present evidence that the defendant had "access" to the copyrighted work and that the two works are "substantially similar."[6] Alternatively, where access is incapable of proof, the plaintiff may present evidence that the works at issue are "strikingly similar";[7] the "striking" nature of the similarity allows the court to infer the defendant's access to the

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[1] *See, e.g.*, Arnstein v. Porter, 154 F.2d 464, 68 U.S.P.Q. (BNA) 288 (2d Cir. 1946) (Clark, J., dissenting) (assessing the confused state of musical plagiarism jurisprudence).

[2] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 18 U.S.P.Q.2d (BNA) 1275 (1991); Harper & Row, Publishers, Inc. v. Nation Enter., 471 U.S. 539, 225 U.S.P.Q. (BNA) 1073 (1985).

[3] Indeed, a certificate of copyright registration, before or within the first five years of publication, constitutes prima facie evidence of ownership of a valid copyright. *See* 17 U.S.C. § 410(c); Tisi v. Patrick, 97 F. Supp. 2d 539, 55 U.S.P.Q.2d (BNA) 1117 (S.D.N.Y. 2000).

[4] The following may be copyrighted: literary, musical, and dramatic works, pantomimes or choreographic works, pictorial, graphic, or sculptural works, motion pictures/other audiovisual works, sound recordings, and architecture. 17 U.S.C. § 102.

[5] For an excellent discussion of the uniqueness of music among copyrightable subject matter, *see generally* Paul M. Grinvalsky, Comment, *Idea-Expression in Musical Analysis and the Role of the Intended Audience in Music Copyright Infringement*, 28 CAL. W. L. REV. 395 (1992).

[6] *Arnstein*, 154 F.2d at 468; McRae v. Smith, 968 F. Supp. 559, 562, 44 U.S.P.Q.2d (BNA) 1131 (D. Colo. 1997).

[7] *McRae*, 968 F. Supp. at 565.

copyrighted work.[8] The inquiry does not end there, for the plaintiff must also prove that the similarities, if they exist at all, result from an *illegal* copying of the plaintiff's work.[9]

Courts have inconsistently defined the parameters of "substantial similarity" for copyright infringement purposes.[10] Likewise, while some authorities posit that, to be "striking," the possibility that similarities between the two works resulted from independent creation, coincidence, or prior common source must effectively be precluded,[11] most courts have not defined adequately the boundaries of the "striking similarity" doctrine, nor the point at which "substantial" similarity becomes "striking."[12] This Note seeks to more clearly define the factual circumstances under which similarities between two musical works properly can be labeled "striking." The discussions herein will probe the distinctions between substantial and striking similarities by comparing judicial treatments of "substantially similar" and "strikingly similar" claims within the exclusive context of copyrighted musical works.

I. LITIGATING COPYRIGHT INFRINGEMENT CLAIMS FOR MUSICAL WORKS: THE FRAMEWORK PROVIDED BY *ARNSTEIN V. PORTER*[13]

The Second Circuit's decision in *Arnstein v. Porter* provided the framework for almost all infringement litigation of copyrighted musical works.[14] In *Arnstein*, the

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[8] Selle v. Gibb, 741 F.2d 896, 223 U.S.P.Q. (BNA) 195 (7th Cir. 1984).

[9] Not all copying of an original work qualifies as illegal misappropriation; some falls within statutory exceptions such as "fair use." *See* 17 U.S.C. § 107 (codifying the parameters of the "fair use" doctrine).

[10] Even the phrase "substantial similarity" has engendered a great deal of confusion among jurists, predominately because of its dual application in the copying and misappropriation phases of copyright analysis. *See* Ringgold v. Black Entm't Tel., Inc., 126 F.3d 70, 44 U.S.P.Q.2d (BNA) 1001 (2d Cir. 1997) ("[W]hen 'substantial similarity' is used to mean the threshold for copying as a factual matter, the better term is 'probative similarity,' and . . . 'substantial similarity' should mean only the threshold for actionable copying."). *Id.* at 74.

[11] *Selle*, 741 F.2d at 901-02.

[12] Indeed, the author has found very few cases decided in favor of a plaintiff who argued that his copyrighted work and the infringing work were "strikingly similar." *See* Gaste v. Kaiserman, 863 F.2d 1061, 9 U.S.P.Q.2d (BNA) 1300 (2d Cir. 1988) (holding that plaintiff presented sufficient evidence to permit a jury to infer access based on striking similarity); *but see Tisi*, 97 F. Supp. 2d at 548 (holding that "plaintiff has made no showing of striking similarity"); *McRae*, 968 F. Supp. at 565 (holding "protectable elements not strikingly similar").

[13] 154 F.2d 464 (2d Cir. 1946).

[14] Circuit Courts of Appeals and U.S. District Courts across the country have relied on *Arnstein* as persuasive. *See, e.g.*, *McRae*, 968 F. Supp. at 559; Three Boys Music Corp. v. Bolton, 212 F.3d 477, 54 U.S.P.Q.2d (BNA) 1720 (9th Cir. 2000).

Second Circuit reviewed a lower court's refusal to grant the plaintiff a jury trial.[15] While ultimately remanding the case on the grounds that the plaintiff was entitled to a jury trial,[16] the Second Circuit set forth the proof scheme a plaintiff is required to meet in copyright actions, particularly where musical works are concerned.[17]

The court began by noting that a plaintiff must prove not only copying, but also that the copying qualifies as "improper appropriation."[18] Copying is established either by direct evidence (the defendant's admission that he copied), or, more frequently, circumstantial evidence "from which the trier of the facts may reasonably infer copying."[19] Circumstantial evidence may be presented in two forms: the plaintiff may prove that the defendant had "access"[20] to the plaintiff's work and that the works are "similar," or he may prove that the similarities between the works are so striking that the court should infer the defendant's access, even if actual evidence of access is weak.[21]

Many courts[22] have limited a striking similarity allegation in the following way: "If evidence of access is absent, the similarities must be so striking as to preclude the possibility that plaintiff and defendant independently arrived at the same result."[23] Therefore, the court differentiates between the necessary level of similarity if the plaintiff's evidence of access is strong and the quantity of the plaintiff's similarity showing where he can present little evidence of access. However, the court gives no guidance as to what type or quantity of evidence is required to distinguish those similarities that are merely substantial from those which "strike" the court, allowing it to infer access.

Following its discussion of copying, the *Arnstein* court posits a second question that must be answered: Has the defendant "illicitly" copied the

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[15] *Arnstein*, 154 F.2d at 468.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Access to a plaintiff's work can be demonstrated in a number of ways. One court has posited the following two avenues as most common: 1) the plaintiff's work and the defendant's access to that work are evidenced by a "particular chain of events" that lead from one to the other (by dealing with a record company or publisher); or 2) the plaintiff's work has been widely disseminated. *Three Boys Music Corp.*, 212 F.3d 477, 482, 54 U.S.P.Q.2d (BNA) 1720, 1724 (9th Cir. 2000); *see also* Repp v. Webber, 132 F.3d 882, 890, 45 U.S.P.Q.2d (BNA) 1285, 1292 (2d Cir. 1997) (examining both of these scenarios in determining whether a defendant had access to a plaintiff's work).

[21] *Arnstein*, 154 F.2d at 469.

[22] *See Repp*, 132 F.3d at 890; Dimmie v. Carey, 88 F. Supp. 2d 142, 149 (S.D.N.Y. 2000).

[23] *Arnstein*, 154 F.2d at 468.

plaintiff's work?[24] The court refers to this element as "misappropriation":[25] first noting that there can be "permissible copying,"[26] the court then states, "[t]he question, therefore, is whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff."[27] The court noted that, while analytic dissection of the at-issue works by musical experts is proper when considering the issue of copying,[28] misappropriation by contrast, must be determined by the "lay listener," rendering expert testimony irrelevant.[29] If the trier of fact determines that the defendant has not only copied, but also misappropriated, certain elements of the work, then, and only then, may the defendant properly be found liable for copyright infringement.[30]

II. SUBSTANTIVE JUDICIAL MODIFICATIONS OF THE ARNSTEIN MODEL: *SID & MARTY KROFFT TELEVISION PRODUCTIONS, INC. V. MCDONALD'S CORPORATION*[31] AND THE IDEA/EXPRESSION DICHOTOMY

Since the *Arnstein* decision in 1946, certain courts have elaborated upon and, in some cases, modified the copyright propositions for which *Arnstein* stood. The most notable of these cases is *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*[32] While *Krofft* did not involve an alleged infringement of a copyrighted musical work, its implications for all subjects covered under copyright law, including musical works, are clear.[33]

In *Krofft*, the plaintiffs, owners of a copyrighted children's television show, were awarded damages based on copyright infringement of that show by the defendants.[34] The defendant appealed to the Ninth Circuit, arguing that, as a matter of law, its copying of the plaintiffs' work did not constitute misappropriation because the defendants' work and the plaintiffs' work were too "dissimilar."[35]

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[24] *Id.*
[25] *Id.* at 473.
[26] *Id.* at 472.
[27] *Id.* at 473.
[28] *Arnstein*, 154 F.2d at 468.
[29] *Id.* at 473.
[30] *Id.* at 468.
[31] 562 F.2d 1157, 196 U.S.P.Q. (BNA) 97 (9th Cir. 1977).
[32] *Id.*
[33] Indeed, the litigation framework established in *Krofft* was held applicable to infringement actions involving copyrighted musical works in Baxter v. MCA, Inc., 812 F.2d 421, 2 U.S.P.Q.2d (BNA) 1059 (9th Cir. 1987).
[34] *Krofft*, 562 F.2d at 1165.
[35] *Id.*

The court eventually concluded that, under its "idea/expression" analysis, the defendants had indeed infringed on the plaintiffs' copyright.[36] It is this "idea/expression" dichotomy that requires further discussion.

The court first noted that "two competing social interests" justify the existence of copyright law: "rewarding an individual's creativity and effort while at the same time permitting the nation to enjoy the benefits and progress from use of the same subject matter."[37] From this policy base, the court determined that copyright infringement occurs only where a defendant has copied the expression of a plaintiff's idea, rather than simply the idea itself.[38]

The court adopted a two-pronged test to determine the level of similarity between two works.[39] The first part, labeled the "extrinsic test," evaluates the level of similarity between the ideas proposed by the two works.[40] On this point, analytic testimony, including the opinions of expert witnesses in the field, is not only helpful, but essential.[41] Because this element depends upon the identification and comparison of specific criteria, the court may decide, as a matter of law, whether the ideas contained in the two works are substantially similar.[42] If the court finds no similarity of ideas, the inquiry ends with a verdict for the defendant.

The second portion, or "intrinsic test," evaluates whether, beyond the now established similarity of ideas, there are similarities in the manner in which the two works express those ideas.[43] This intrinsic test relies upon the observations of the "ordinary reasonable person,"[44] eschewing the analytic dissection and expert testimony which characterized the extrinsic test.[45] Determining the level of similarity between the expressions contained in both works is delegated to the trier of fact.[46]

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[36] *Id.*

[37] *Id.* at 1163.

[38] *Id.* The Ninth Circuit noted that "the protection granted to a copyrighted work extends only to the particular expression of the idea and never to the idea itself" (citing Mazer v. Stein, 347 U.S. 201, 217-18, 100 U.S.P.Q. (BNA) 325, 333 (1954)).

[39] *Krofft*, 562 F.2d at 1164.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Krofft*, 562 F.2d at 1164; *see also* Twentieth Century-Fox Film Corp. v. Stonesifer, 140 F.2d 579, 582, 60 U.S.P.Q. (BNA) 392 (9th Cir. 1944) (stating that in the context of a motion picture and screenplay, the at-issue works should be tested "by the observations and impressions of the average reasonable reader and spectator").

[45] *Id.*

[46] *Id.*

After its discussion of this bifurcated test, the *Krofft* court compared its own test to the model developed by the *Arnstein* court some thirty years earlier.[47] The court concluded that it had not modified *Arnstein*, but simply made explicit (through its idea/expression dichotomy) what *Arnstein* had only implied.[48] The "copying" test described in *Arnstein* was the functional equivalent of the *Krofft* court's statement that one must first establish whether or not a substantial similarity exists between the ideas of two works.[49] Likewise, the second portion of the *Krofft* test, dealing with expression, equates with *Arnstein*'s holding that infringement is an *improper* copying of one's original work. Thus, unlawful appropriation is legally synonymous with copying another's protected expression.[50]

While both the *Arnstein* and *Krofft* courts seem to share compatible philosophical ideas, there is one functional (and substantial) difference between the approaches taken by each. The *Arnstein* test essentially measures substantial similarity by reference to the *quantity* of probative, verifiable matches shared by each of the two works; thus, the court arrives at the conclusion that access to a plaintiff's work may be inferred where the amount of similarities "strike" the court's judgment.[51] *Krofft*, by contrast, makes little mention of access, and overlooks entirely the *Arnstein* formulation of similarity by lesser or greater degree;[52] indeed, the degree to which one piece of music must be similar to the other is not commented upon by the court, leaving the reader to wonder at what point the similarities become "striking" or even "substantial."

III. COMPARING FACTUAL FINDINGS REGARDING SUBSTANTIAL AND STRIKING SIMILARITY: WHERE JUDGES AND JURIES HAVE DRAWN THE LINE

Before attempting to define the border between substantial and striking similarity, some initial observations are in order. First, while a study of copyright actions involving musical works contains its own unique terms (rhythm, harmony, etc.), the ideas embodied in these terms can and often do roughly correspond to similar ideas or terms in the other subject matter headings listed as

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[47] *Id.* at 1164-65.
[48] *Id.*
[49] *Krofft*, 562 F.2d at 1164.
[50] *Id.*
[51] *Arnstein*, 154 F.2d at 468.
[52] *Krofft*, 562 F.2d at 1164-65.

copyrightable.[53] It is in the practical application of these universal ideas that difficulties specific to musical copyright litigation arise.

Further, copyright litigators should also be aware that the "idea / expression" analysis found in *Kroffi Tel. Prod., Inc. v. McDonald's Corp.*[54] will influence litigation strategies regarding infringement of copyrighted musical works. Musical "ideas" (however ambiguously defined) are not protectable under copyright law;[55] practically, this further defines the substantial or striking similarity inquiry by adding "uniqueness" as one of the criteria by which similarity is judged. For example, in cases where judges are called upon to determine the similarities between two pieces of popular music, many courts have taken judicial notice of the "limited number of notes and chords available to composers and the resulting fact that common themes frequently reappear in various compositions."[56] In other words, the ideas underlying both compositions are essentially the same and may be common to a large number of pieces of music. Thus, the court is compelled to analyze whether the allegedly infringing work has copied the unique organization of these common (or, in some cases, trite) ideas.[57] Simply establishing that both works found their genesis in a common pool of ideas will be insufficient where courts acknowledge that the spectrum of musical ideas is relatively small.[58]

Moreover, defendants have derived a number of litigation strategies from the general judicial recognition that musical ideas, especially those recurrent in popular music, are finite. For instance, it is not uncommon for a defendant to claim that, while his work is obviously similar to the copyrighted work, both works ultimately derive from a common source. Defendants predominately rely upon two types of common sources.

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[53] For instance, the elements of theme, structure, character, setting and phrasing, among others, may apply to both musical and literary works. *Compare Repp*, 132 F.3d at 886-88, *with* Toliver v. Sony Music Entm't, Inc., 149 F. Supp. 2d 909, 60 U.S.P.Q.2d (BNA) 1502 (D. Alaska 2001).

[54] 562 F.2d 1157, 196 U.S.P.Q. (BNA) 97 (9th Cir. 1977).

[55] *See Mazer*, 347 U.S. at 201 (noting that a copyright, unlike a patent, protects only the expression of the idea, not the idea itself).

[56] Gaste v. Kaiserman, 863 F.2d 1061, 1068, 9 U.S.P.Q.2d (BNA) 1300 (2d Cir. 1988).

[57] *See generally McRae*, 968 F. Supp. at 559 (discussing the protectable elements of a copyrighted work).

[58] *Id.* at 566; *see also Selle*, 741 F.2d 896 (discussing the burden of proving "striking similarity" between two compositions). It is unclear whether this "uniqueness" criterion will be applied outside the popular music context to genres where the musical forms are significantly more complex and the availability of thematic, harmonic, and rhythmic material is not nearly so limited. Courts have implied distinctions between the analysis necessary for popular music and that appropriate to more complex musical forms. *Id.* at 899 (noting with skepticism that a classical musicologist had never made a comparative study of two popular musical works).

First, the defendant may try to establish that his allegedly infringing work actually derives from the defendant's own prior work. In *Repp v. Webber*,[59] the defendant disavowed any illicit copying, but also asserted that the composition at issue was more similar to his own previously published work than to the plaintiff's work.[60]

Second, the defendant may also posit that his composition derives from other public domain works rather than the plaintiff's work. *Repp* illustrates this strategy perfectly: the defendant's expert alleged similarities between the infringing work and public domain works from differing genres, including a Prelude from Johann Sebastian Bach's *Well-Tempered Clavier* and an excerpt from Edvard Grieg's *Melodie*.[61]

Without enumerating the types of evidence a defendant would introduce in this effort (which, while beyond the scope of this Note, will inevitably be similar to the evidentiary issues discussed below), copyright litigators should beware the quandary in which the plaintiff could find himself should this evidence prove persuasive. At the very least, the defendant has cast a great deal of doubt upon the basic assumptions made by the plaintiff's allegations; at worst, the defendant has succeeded in making the trier of fact believe that it was actually the plaintiff who did the copying.[62]

Finally, litigators should be keenly aware that, as in other litigation, many of the copyright determinations will turn on the credibility of the expert witnesses employed by the plaintiff. This dictum takes on special significance in the musical context because, in the majority of the cases discussed in this Note, not only were the expert witnesses professional musicians whose command of music theory and composition was unparalleled, but also in most cases, some of the very best musicologists and theorists that could be employed in venues such as this.[63] Courts tend to afford greater deference to the empirical findings of an expert whose curriculum vitae includes professorial appointments at universities which traditionally symbolize a high level of musical scholarship (The Juilliard School,

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[59] 858 F. Supp. 1292, 32 U.S.P.Q.2d (BNA) 1257 (S.D.N.Y. 1994).

[60] *Id.* at 1297-98.

[61] *Id.* at 1298.

[62] This type of evidence can be devastating to plaintiffs, but it also opens a window of opportunity for the plaintiff to allege and prove that the defendant has a history of "borrowing" from other musical sources. Any defense allegations that the defendant tends to be "influenced" by other composers could substantiate that the defendant also borrowed in this case.

[63] For example, the cases discussed in this Note included an expert witness representing the Northwestern University School of Music and the Chicago Symphony Orchestra, *Selle*, 741 F.2d at 899; the Chair of the Music and Performing Arts Department at New York University and a Professor of Graduate Studies at the Juilliard School, *Tisi*, 97 F. Supp. 2d at 543; and the Chair of the Musicology Department at the City University of New York, a prolific author who was widely regarded as one of the world's most distinguished musicologists, *Repp*, 132 F.3d at 886.

Indiana University, Eastman School of Music, etc.). These comments are included simply to highlight the potential need for scholars of the very highest musical order should the stakes in a copyright infringement case turn out to be surprisingly high.[64]

A. JUDICIALLY RECOGNIZED CHARACTERISTICS OF MUSICAL COMPOSITIONS

Courts and commentators have disagreed over which particular characteristics of musical compositions should form the basis for a comparison between a copyrighted work and an allegedly infringing work. Although there is little consensus with regard to specific details,[65] courts generally categorize musical technicalities into one of four groups: melody, harmony, rhythm and structure.[66] These classifications have been attacked by commentators,[67] but remain the standard categories into which musical similarities must fit.[68]

Perhaps the most simple and straightforward of these categories is melody. Almost everyone has a sense of what a melody is: the tune or theme around which a piece of music is constructed. Deciphering melodic content can, however, seem deceptively simple when, at times, the inquiry into whether the "melodies" of two compositions are similar (in a justifiably legal sense) is every bit as complex as the inquiries into the similarities of the other essential components named above. One commentator has noted that many substantial and striking similarity analyses turn on the overall comparisons between the melodic structures of two works because of the relatively limited number of

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[64] The witnesses called to present testimony regarding musicological and theoretical comparisons are uniformly classically trained and educated. This remains true, even when the compositions being compared are "pop" songs and the expert has little knowledge of the specific genre.

[65] This is undoubtedly due to the sophisticated nature of the musical composition process, coupled with a general lack of musical training or understanding among jurists.

[66] *See Tisi*, 97 F. Supp. 2d at 539 (utilizing the four groups to show that two pieces of music were not strikingly similar). For an informative article giving a general overview of the basic functions of these categories and their relationship to each other, *see* Paul J. Heald, *Reviving the Rhetoric of the Public Interest: Choir Directors, Copy Machines, and New Arrangements of Public Domain Music*, 46 DUKE L.J. 241 (1996).

[67] For some of the more critical reviews of the inadequacy of these categories, *see* Grinvalsky, *supra* note 5 (discussing the difficulty a fact-finder has distinguishing between two similar pieces of music); Aaron Keyt, Comment, *An Improved Framework for Music Plagiarism Litigation*, 76 CAL. L. REV. 421 (1988) (arguing that existing criteria for distinguishing copyrighted musical material is inadequate); Michael Der Manuelian, Note, *The Role of the Expert Witness in Music Copyright Infringement Cases*, 57 FORDHAM L. REV. 127 (1988) (examining expert witnesses' use of the four groups).

[68] This may be so because of judicial convenience or because no other appropriate mechanism for debating the relative similarities of two musical compositions has developed. *See generally* Keyt, *supra* note 67, at 429 (discussing the element of copying in a copyright suit); Grinvalsky, *supra* note 5, at 395 (noting the highly intangible quality of music).

original choices a composer can make with regard to rhythm, harmony and musical form.[69]

A melody consists of a series of successive pitches which will recur throughout the piece. Courts will focus on, among other things, the uniqueness of this particular succession of notes, the shape and line of the musical phrase the notes represent, when and how often they recur in each piece and whether or not one melody evokes the same emotion or "mood" as the other.[70]

Harmonic structure is the relationship of each pitch included in a composition to the other pitch choices made by the composer. If successions of pitches can, as noted above, be quite unique, the harmonic choices one can make after the melodic content is set forth are, at least in theory, potentially boundless,[71] and have multiplied exponentially with the advent of the complex jazz and classical formulas prevalent in the mid to late twentieth century.[72]

Courts often speak of the number and frequency of common chord progressions;[73] however, this simplistic approach has done little to focus copyright litigators' attention on harmonic elements that may actually indicate probative similarity. Likewise, simply comparing keys, modes and general harmonic style (all of which are both common and unprotectable) can lead a court to mistakenly conclude two pieces are dissimilar when, in fact, a closer inspection would have revealed otherwise.[74] A court's willingness to consider the unique musical

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[69] *See* Keyt, *supra* note 67, at 431. The author generally agrees with Keyt's assertion that the originality of melodic content is highly persuasive, especially when comparing two popular musical expressions, but is skeptical of the application of this generalization outside the realm of pop music, noting the proliferation of non-traditional rhythmic, harmonic and structural forms in both classical and jazz music development in the twentieth century.

[70] One must remember here that emotion, or "mood," as it is referred to by some courts, is not a protectable expression under copyright law. However, where both works provoke the same specific emotion, and that emotion is not so frequently represented in the literature as to be considered trite, courts have indicated a willingness to consider this type of plaintiff's evidence, subject to its connection with elements of the musical expression that are copyrightable. *See McRae*, 968 F. Supp. at 567 (noting that a mood shared by many songs is unprotectable, but leaving open the possibility that the uniqueness of moods, when combined with other protected elements, can evidence similarity).

[71] Here, again, one must note that harmonic choices are, by either historical design or aesthetic concerns, more limited within the realm of the pop music genre. This has led at least one court to conclude that evidence of striking similarity must comport with the court's strictest scrutiny. *Id.* at 566 (asserting that courts have traditionally interpreted the standard of striking similarity "very stringently").

[72] *See generally* DONALD J. GROUT & CLAUDE V. PALISCA, A HISTORY OF WESTERN MUSIC 807-80 (4th ed. 1988).

[73] *Selle*, 741 F.2d at 904.

[74] Litigators with musical backgrounds frequently are caught between two equally unproductive strategies. Introducing evidence of comparative similarities that can be easily understood by judge

"fingerprint" embodied in the modulations between keys and modes[75] offers more promise of the possibility of getting to the core of demonstrating true harmonic similarity. Nonetheless, an ill-educated judiciary likely will base its conclusions on the most easily demonstrable harmonic effects, despite the potentiality that probative harmonic similarity may not be at all evident from this type of analysis.[76]

Courts also examine the "rhythm" of the two compositions. Rhythm is loosely related to the spatial relationship between the pitch choices and is generally accepted to include duration of both individual notes and larger musical units such as phrases, themes or even entire compositions. Rhythm naturally encompasses "meter," the number of musical pulses contained in each bar (or subdivision) of a composition, but is more likely to be characterized in scholarly circles as the "symmetry" linking the other artistic choices made by the composer. Rhythm also covers the fluctuations in tempo (the speed at which the notes of a composition are played) within a piece. However, again, educated musicians regard tempo as merely a small portion of the overall symmetry of the composition, making judicial focus on whether one composition is played faster or slower than another highly suspect and even irrelevant to the similarity inquiry.

Courts may be likely in this context to focus on the specific correlation between the durations of notes in each composition.[77] Common meter, while not a copyrightable element by itself, may be cited by the court if used in a "unique" manner that establishes more than an intent to use something common to many compositions. Another more insightful avenue of proving similarity involves analysis of the symmetrical relationships between pitches and the placement of certain musical events within the scope of the piece. Thus, the symmetry is dissected on two levels: the interrelation of pitches within the smaller units (measures, bars, or phrases), and the interrelation within the piece when viewed as a whole.

This symmetrical view of entire compositions provides an appropriate bridge to the final category under which comparison will be made: structure.[78] Structure

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and jury alike often leads the fact-finder to conclude that the similarities are based on musical ideas that are not protectable. By contrast, introducing a more complex analysis of the harmonic structure of the two works to a fact-finder that is largely ignorant of musical subtleties will likely engender confusion and, consequently, a verdict for the defendant.

[75] *Tisi*, 97 F. Supp. 2d at 545.

[76] *See* Grinvalsky, *supra* note 5, at 397 (offering insight into the typical judicial treatment of harmonic similarities between musical compositions); Keyt, *supra* note 67, at 428.

[77] *McRae*, 968 F. Supp. at 566 (stating that striking similarity is not established where certain individual notes of each composition do not share "significant amounts of . . . rhythm").

[78] Musical scholars generally deem commentary regarding the symmetrical boundaries of a composition as also commenting upon the overall structure of a piece, such that the two elements

is a catch-all phrase that sweeps in a number of dissimilar elements of musical composition that do not fit neatly within any of the three previous classifications but, nevertheless, can provide probative evidence of similarity and, thus, must be considered. Certainly, structure includes any conscious effort on the part of the composer to dictate a specific order for the composition. Examples of this type of overarching structure range from the relationship between verses and chorus in a rock ballad to the most complex variations on sonata form promulgated by classical composers like Mozart and Beethoven.[79]

However, when a court speaks of structure, it may also be referring to elements of musical composition that are only peripherally related to the organization of the composition. For instance, the "style" of a composition may be analyzed under this category, remembering that it is through the unique application of these general elements that music becomes copyrightable in the legal sense.[80] As a result of the significant overlap between rhythmic and structural content, and because assertions of rhythmic or structural similarity tend to function as supporting, rather than primary, allegations in music copyright cases, they will be discussed together in this Note.[81]

The next focus of this Note will be to ascertain the particular methods in which courts have applied these categories in the context of specific works. Generally, however, other elements of music not capable of classification under one of these broad categories may nevertheless be given significant weight if the fact-finder believes that this element clearly points to an improper similarity between two musical works. Where appropriate, this Note will reference these non-traditional elements.

B. MELODY AND MELODIC CONTENT

Melody, being the first and potentially most dispositive of the four elements named above,[82] establishes the character of the composition. Courts may analyze

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are significantly interrelated.

[79] *See, e.g.*, Wolfgang Amadeus Mozart, Sonata in C Major, K. 330 (1778), *in* W.A. MOZART: SONATAS AND FANTASIES FOR THE PIANO 138-51 (Nathan Broder ed., Theodore Presser Co., 1960); Ludwig van Beethoven, Sonata quasi una Fantasia, Op. 27, No. 2 ("Der Mondschein"), *in* LUDWIG VAN BEETHOVEN: COMPLETE PIANO SONATAS, VOLUME I, 248-61 (Heinrich Schenker ed., Dover Publications, Inc., 1975).

[80] *Krofft*, 562 F.2d at 1165, 196 U.S.P.Q. (BNA) at 103.

[81] *See supra* note 78 and accompanying text.

[82] *See* Keyt, *supra* note 67, at 431 ("It is in the melody of the composition—or the arrangement of notes or tones that originality must be found. It is the arrangement or succession of musical notes, which are the fingerprints of the composition, and establish its identity.") (quoting Northern Music Corp. v. King Record Distrib. Co., 105 F. Supp. 393, 400, 93 U.S.P.Q. (BNA) 512, 517 (S.D.N.Y. 1952)).

the succession of notes in the melodic line, the relationship of those notes to each other, and the intervals (musical distances) between each note, as well as survey the numerical/empirical factors which characterize the melodic line (how many notes are included in each theme; how many pitches in each are the "same"; at what points in the melodic line do those similar pitches fall; do the pitches ascend or descend, etc.). Again, some commentators feel that this essentially numerical approach rarely provides any meaningful insight into the character and core of the at-issue works. Nonetheless, these fundamental inquiries provide the basis for most judges' first impression of the melodic content of the at-issue works.

Thus, a court's first question is usually a paraphrase of the following: How many notes do the themes of the two works share?[83] Such a basic question often leads courts to form influential first impressions either for or against substantial copying, even though a finding of copying on this basis is replete with illogical assumptions. However, it is quite obvious that two melodies can be aurally identical and yet not share any common "notes." Thus, reliance on common pitches is misleading at best.

Litigators and musical experts often try to solve this problem by either transposing the infringing work into the same "key" as the copyrighted work, or by transposing each to a neutral key. This certainly provides the most appropriate basis for making a simple note for note, pitch for pitch comparison; however, other unique elements that could be contributing to melodic similarity may be sacrificed.[84] A better solution to this dilemma (and one employed by some musical experts in the cases mentioned in this Note) is to refrain from transposing the compositions (thus preserving the inherent musical nuances that result from the choice of a particular key)[85] and focus instead on the relational distances between the pitches of each melody. These distances are referred to as "inter-

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[83] *See, e.g.*, Allen v. Walt Disney Prods., 41 F. Supp. 134, 50 U.S.P.Q. (BNA) 365 (S.D.N.Y. 1941); Gingg v. Twentieth Century-Fox Film Corp., 56 F. Supp. 701, 62 U.S.P.Q. (BNA) 121 (S.D. Cal. 1944); *Repp*, 858 F. Supp. at 1292, 1303.

[84] It is ironic, and somewhat mystifying, that most courts tacitly authorize this use of transposition when analyzing the melodic content of a work (at least implicitly endorsing the notion that key signature has little to do with probative similarity), and yet, may choose to credit a finding against substantial or striking similarity in part to the fact that the two compositions were not written in the same key. *See Repp*, 858 F. Supp. at 1303, 32 U.S.P.Q.2d (BNA) at 1265 (holding no substantial similarity exists where "the two pieces differ in . . . key . . .").

[85] Though the contention is incapable of concrete proof, it is widely understood in compositional circles that key signatures evoke certain "moods" or "emotions" in the listener. Thus, Mozart regarded D Major to be the key of royalty and often set operatic arias written for characters who were members of the nobility in this key. *See* "Hai già vinta la causa! . . . Vedrò mentr'io sospiro," *in* WOLFGANG AMADEUS MOZART, LE NOZZE DI FIGARO, 291-300 (G. Schirmer, Inc., 1951).

vals." Courts can then ascertain the number of intervals in common,[86] rather than concentrating exclusively on common pitches.

This empirical approach is highly simplistic, and, at least at first glance, understanding its ramifications for the bridge connecting substantial and striking similarity is not difficult. Whether the court is analyzing melodic content under the common pitch or common interval approach, the outcome is essentially the same; similarity is determined based on quantity.[87] The more intervals or pitches the two melodies share, the greater the likelihood the court will find that similarity exists.[88]

However, there is an implication running throughout the copyright cases that the thematic material of two musical works must be nearly identical in order to sustain a claim of striking similarity. In *Heim v. Universal Pictures Co.*,[89] the Second Circuit, when comparing the similarities between two compositions, concluded that where there is little or no evidence of access to the plaintiff's work, "mere similarity" would not be sufficient.[90] However, the court noted that a comparison of the thematic material led it to conclude that the "identity is unmistakable."[91] Likewise, in *Allen v. Walt Disney Prods.*,[92] the plaintiff alleged that the themes of his protected composition and the allegedly infringing one were "identical with two minor changes."[93] While ultimately concluding that threshold copying requirements had not been met, the court discussed the potential identity between the thematic material of the two works, strongly suggesting that had the court credited the plaintiff's expert witness, the allegation of melodic "identity" would have been persuasive.

To this writer's knowledge, no courts have explicitly held that thematic identity (or near identity) is an integral allegation in a striking similarity claim. Nonethe-

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[86] Admittedly, this approach still advocates similarity based on numerical comparisons alone, completely overlooking quality-based melodic comparisons.

[87] For an excellent example of the application of this analytic "rule" (and its ostensible deficiencies), *see McRae*, 968 F. Supp. at 566. There, the court concluded that compositions were not substantially similar where their melodic lines did not "share significant amounts of either pitch or rhythm" and there were no places in both compositions that contained "three musical notes in a row" that were identical. *Id.*

[88] This can be more difficult for a court than it might appear because experts often disagree over exactly how many notes or intervals two compositions "share." *See Allen*, 41 F. Supp. at 139-40 (plaintiff's expert proffered that the notes found in the two compositions were identical in twenty-seven of the thirty measures analyzed, whereas defendant's expert opined that identity existed in only four or five measures).

[89] 154 F.2d 480, 68 U.S.P.Q. (BNA) 303 (2d Cir. 1946).

[90] *Id.* at 487.

[91] *Id.*

[92] 41 F. Supp. 134, 50 U.S.P.Q. (BNA) 365 (S.D.N.Y. 1941).

[93] *Id.* at 137.

less, courts looking to infer access from the striking similarities between two compositions will be especially stringent in assessing the fact basis for such an allegation.[94] This raises the inference that the melodies must be almost identical before the court will take such a claim seriously.[95]

Within a melodic line, the location, or symmetrical position, of certain identical or similar pitches/intervals will often be highly relevant to the copying inquiry.[96] In *Repp v. Webber*,[97] Andrew Lloyd Webber, of Broadway and concert fame, counterclaimed that his work "Close Every Door" had been plagiarized by Ray Repp, a liturgical musician in New York.[98] In comparing Repp's "Till You" to "Close Every Door," experts for both parties sought to illuminate the similar symmetrical positions of pitches or intervals. The court noted in its findings of fact that the melody of the first phrase of each song began with the "identical interval of a sixth."[99] Moreover, in deference to the expert for the defendant, the court found that a three-note "oscillation" placed in the beginning phrase of each song returned to its original note in "Till You" but not in "Close Every Door."[100] The placement of these notes and intervals within the melodic line influenced the court's final decision.

Melodic symmetry likewise played an influential role in *Selle v. Gibb*.[101] There, the court was asked to assess the similarity between "Let It End," written by Chicago native Ronald Selle, and "How Deep Is Your Love," made popular by the Bee Gees in the late 1970s. The plaintiff's musical expert testified that the thematic material of plaintiff's and defendant's compositions contained thirty-four notes and forty notes, respectively. Of these, twenty-four were identical in both pitch and symmetry.[102]

Here, again, discerning the application of pitch or interval symmetry principles to the debate over whether similarity rises to a level that is "striking" is not

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[94] *See McRae*, 968 F. Supp. 559.

[95] *See also Selle*, 567 F. Supp. at 1178-79 (asserting that "near identity of two songs on a note-by-note, measure-by-measure basis" demonstrates "striking similarities").

[96] In fact, some experts posit that comparisons of identical pitches or intervals are largely irrelevant unless one also compares their symmetrical positions within the melodic line. While the author is inclined to agree with this proposition, not all courts have adopted this more sophisticated approach, opting instead for counting identical pitches separately from counting the number of symmetrical positions occupied by these pitches. *See Repp*, 132 F.3d at 886 (plaintiff's expert separated pitch identity and rhythmic symmetry).

[97] 947 F. Supp. at 112-14.

[98] In the original action, Repp alleged that Lloyd Webber had copied one of his works, "Till You," in creating the melody for his song "The Phantom of the Opera." *See* 892 F. Supp. at 555-56.

[99] 947 F. Supp. at 112.

[100] *Id.* at 113.

[101] 741 F.2d at 899-900.

[102] *Id.*

difficult, at least in theory. Where one wishes to prove substantial similarity, one must allege a general symmetrical alignment between several of the fundamental pitches in a melodic line. If, however, evidence of access is lacking and one must rely on comparison alone, the plaintiff's burden of proof becomes significantly more exacting, with references made to nearly identical pitches or intervals in near identical positions within the theme. Exactly what quantity of symmetrical similarity a court will consider dispositive remains unclear.[103]

In most instances, a composition contains significant alterations to the thematic material of its original statement, which occurs throughout its subsequent reappearances within the work. Even melodies created completely in a vacuum can look and sound alike because of the limited number of notes and sounds that are available to composers and pleasing to listeners.[104] Furthermore, the generic nature of the note-for-note inquiry can lead to absurd findings regarding similarity (or lack thereof) when one has a small quantity of notes or symmetrical positions with which to work. In contrast, the manner in which a composer chooses to treat his melody after its original statement is significantly more indicative of both creativity and specificity. These treatments often generate a greater quantity of musical text to analyze, i.e., more notes, more intervals, more symmetrical positions. Thus, similarity of melodic detail and variation provides a much more reasonable basis for a court's conclusions regarding musical plagiarism.

The methods a composer may use to vary the style or character of a work are quite literally boundless. Embellishments, ornaments, appoggiaturas, grace notes, passing tones, improvised coloratura, and systematic variations all fall within this category, as do a host of other compositional techniques.[105] The technique a

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[103] It should be added here that many courts state that striking similarity can be shown on a relatively small quantity of melodic intervals or pitches, assuming that the melody is so "idiosyncratic" that the defendant's plagiarism of it is obvious. *See, e.g.*, Heim v. Universal Pictures Co., 154 F.2d 480, 68 U.S.P.Q. (BNA) 303 (2d Cir. 1946). Notwithstanding this example, the empirical quantity of similarities remains a viable indicator of a court's willingness to infer access where there is little hard evidence favoring the plaintiff's position.

[104] The Second Circuit acknowledged this reality when it noted that few of the possible notational permutations "suit the infantile demands of the popular ear." Thus, "[r]ecurrence is not . . . an inevitable badge of plagiarism." Darrell v. Joe Morris Music Co., 113 F.2d 80, 46 U.S.P.Q. (BNA) 167, 168 (2d Cir. 1940); *see also* Arnstein v. Edward B. Marks Music Corp., 82 F.2d 275, 28 U.S.P.Q. (BNA) 426 (2d Cir. 1936) ("[I]ndependent reproduction of a copyrighted musical work is not infringement; nothing short of plagiarism will serve.").

[105] Many of these techniques are widely used by composers of classical music, where it is not uncommon to "borrow" material from a fellow composer. *See* Keyt, *supra* note 67, at 425-27 (discussing the informal rules for borrowing music developed by the artistic world).

composer might choose is, of course, unprotectable;[106] however, the expression devolving from the technique, with all of its twists and turns, is protected.

Logically, therefore, an analysis that fulfills the test for substantial similarity may look only to the general thematic material without requiring identity in the variations after the theme has been announced. A striking similarity inquiry, by contrast, should focus on the similarity of details beyond the initial thematic material. Litigators alleging striking similarity must be prepared to present evidence at this intricate level of dissection.

In one case, *Allen v. Walt Disney Productions*,[107] the mere presence of melodic embellishments influenced the litigation. There, the court heard evidence that the Disney song "Some Day My Prince Will Come" was plagiarized from "Old Eli," a song found in a collection of college music published by Yale University.[108] The thematic material contained in the two compositions, while generally similar, was not an exact match; the allegedly infringing work contained "decorative and embellishing notes."[109] The plaintiff sought to marginalize the importance of these embellishments, claiming that they were "of no value and could be ignored" in the court's similarity analysis. The defendant, by contrast, relied heavily upon the inclusion of these notes to establish that his work was dissimilar.[110] The court, in a particularly revelatory statement, concluded that, while both experts agreed that there was some similarity between the melodies, there was "no identity" in either the notes or the rhythm of the contested passages, apparently concurring with the defendant's position that the presence of these decorative notes rendered the compositions dissimilar.[111]

The expert witnesses testifying for both the plaintiff and defendant in *Repp v. Webber*[112] seem to contradict the *Allen* court's reasoning. There, both experts focused on a comparison between what each labeled the "fundamental melodic pitches."[113] In a footnote to its findings of fact, the court asserted that two sixteenth notes lying between the fundamental melodic tones were "merely ornamental and decorative, and discounting them in ascertaining the fundamental melodic pitches is consistent with common musicological analytical practice."[114]

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[106] *Krofft*, 562 F.2d at 1165.
[107] 41 F. Supp. 134 (S.D.N.Y. 1941).
[108] *Id.* at 135.
[109] *Id.* at 139.
[110] *Id.*
[111] *Id.*
[112] 947 F. Supp. 105 (S.D.N.Y. 1996).
[113] *Id.* at 113.
[114] *Id.* at 112-13 n.2. The author is uncertain of the veracity of this statement in the context of copyright infringement actions. *See Allen*, 41 F. Supp. at 139; *see also* Schultz v. Holmes, 264 F.2d 942, 943-45, 121 U.S.P.Q. (BNA) 117, 118-19 (9th Cir. 1959) (indicating that use of one differing

In attempting to reconcile *Allen* and *Repp*, one could distinguish *Repp* by noting that its findings of fact were gathered in the context of an explicit substantial similarity inquiry (because the plaintiff did present evidence of defendant access),[115] whereas the *Allen* court was concerned with the depth of similarity evidence because it deemed the plaintiff's evidence of access lacking.[116] Furthermore, each court may have simply followed the lead of its own expert witnesses, with the experts proffering differing opinions as to the importance of embellishment in the similarity inquiry. While an interpretative conflict on the usefulness of evidence of melodic decoration may be lurking in the background of copyright decisions, it is nevertheless safe to assume that this evidence will be significantly more relevant in cases where striking similarity is alleged.

Common pitches, intervals, symmetrical positions, and alterations or embellishments are the most frequently alleged musical elements to be put "at issue" in a copyright infringement claim. Thus, most courts will base their conclusions on comparisons of these elements, often without reference to less obvious and more complex musical analyses. There are, however, some cases which recognize the validity of alleging similarity based on these musical complexities. Like those previously identified, the elements described below are not protectable because they embody musical ideas. However, unlike those discussed above, there is no empirical method to quantify the parameters of the expression of these ideas, making it significantly more difficult for the court to separate the idea from its expression. Nonetheless, a plaintiff supporting the numerical findings made in the categories discussed above with a nuanced analysis of the shape, progression, and character of the melodic line may help his cause.[117]

The concept of melodic phrasing could arise in copyright infringement cases. A phrase has been defined as a musical sentence, something that has a beginning and ending point and states one musical thought. Phrase marks (long, curved lines printed over or under the thematic material) often help denote the beginning, middle, and ending points of the thought. Phrases may consist of whatever number of notes and rhythmic pulses the composer chooses. On this basis, it is not difficult to see how the unique phrasing choices a composer makes can be substantially copied.[118]

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passing tone in a thematic bar comprised of six notes could substantiate dissimilarity).

[115] *Repp*, 947 F. Supp. at 110-12.

[116] *Allen*, 41 F. Supp. at 136-37.

[117] By using the word "may" in this sentence, the author notes his caution regarding the potential influence of this level of musical dissection. A general lack of understanding regarding these elements coupled with their inherent ambiguity can lead courts either to dismiss them as unprotectable ideas or ignore them altogether.

[118] The author has not encountered many cases in which the plaintiff alleged similarity of melodic phrasing. For one unsuccessful attempt at doing so, *see Allen*, 41 F. Supp. at 138-40 (finding

Melodic character may also influence a court's deliberations. The character of a melody is determined by the mood or emotion it evokes in its listener. A melody derives its character from the manner in which it is stated and the specific notational directions for reproducing it. For instance, melodies can be notated in sweeping, lyrical lines, suggesting a romantic or grandiose mood, in short phrases with directions that certain notes be played in a detached manner, indicating a martial or solemn feel.[119]

Notational devices, such as accent marks and dynamic indications,[120] define a theme's character and are quite easily copied.[121] For instance, where a composer employs an unusual gradation of dynamic marking that is not widely disseminated in the musical literature, showing that the particular mark or set of marks is present in the infringing work might be of some probative value to the plaintiff's case.[122] In another instance, a composer might indicate a specific pattern of accent markings on beats that remain traditionally unaccented or dynamic markings that oscillate between very loud and very soft in rapid succession. Copying the exact pattern of either of these expressions is probably not permissible, even in a jurisdiction that stringently applies idea/expression analysis.[123]

Alleging that the infringing work's melodic emotion or mood is generally similar to the mood your own work evokes is probably a counter-productive strategy. Courts quite simply have a difficult time separating the idea (the emotion or mood) from the particular expression of that idea.[124] Plaintiffs may also allege that the two compositions in question share melodic content similar in tessitura[125] or are written in the same octave. Certainly, copying the tessitura

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similarities, but not to the level of plagiarism).

[119] The key or mode in which a melody is written will influence the type of emotion evoked. Keys and modes are introduced in detail in the next section of this Note; however, this discussion highlights the level of interrelation between these broad musical categories.

[120] Dynamic marks tell the musician the volume level at which to execute a phrase or note.

[121] *See* Granite Music Corp. v. United Artists Corp., 532 F.2d 718, 189 U.S.P.Q. (BNA) 406 (9th Cir. 1976) (defendants acknowledged the similarity of the "first four notes" of two compositions, but noted the melody of its composition was rhythmically "smooth" when compared to the "martial . . . angular" style of the plaintiff's melody).

[122] *See* SERGEI RACHMANINOFF, PRELUDE IN C# MINOR, OP. 3, NO. 2, 5-6 (Boosey and Hawkes, Inc. 1947) (exhibiting unusual dynamic marking usage occurs in Rachmaninov's Prelude in C# minor, Op. 3, No. 2, where, in the latter passages of the work, the composer indicates a volume level of *fff* plus sforzando markings (*sfz*) and accent markings on each chord).

[123] Classical composers in the twentieth century were particularly prodigious in their use of "non-traditional" melodic markings. *See, e.g.*, SERGEI PROKOFIEV, CONCERTO NO. 3 IN C MAJOR FOR PIANO AND ORCHESTRA, OPUS 26, 45-46 (International Music Co. 1956).

[124] *See, e.g., McRae*, 968 F. Supp. at 566-67 (holding that general theme and mood of first person love song not protectable because it is shared by many other songs).

[125] Tessitura refers to pitch location (how high or low the pitches are) along the spectrum of

in which a theme is set can be grounds for suspicion, provided that the tessitura chosen has some unique feature. However, courts may be skeptical of this analysis because of the limited number of octaves from which a composer may choose.[126]

To summarize, plaintiffs are likely to make at least four separate allegations regarding the melodic content of the two compositions being compared: similarity of pitches, similarity of melodic intervals, similarity of pitches and intervals in symmetrical positions, and similarity between the melodic embellishments of the two works. In addition, plaintiff litigators may want to consider the viability of presenting evidence that the thematic material of each shares melodic phrasing, character, mood, and tessitura. The implications for both substantial and striking similarity are generally clear (though the delineations are not extraordinarily helpful): the less influential one's evidence of access, the more likely one will be called upon to produce a highly specific analysis of the probative similarities between, not only the general thematic material of the two works, but also the detailed melodic calculations each composer has incorporated.

C. HARMONY AND HARMONIC CONTENT

Harmony has been loosely defined by a musical expert in one copyright infringement action as "the essence of how one chord (consisting of three or more notes sounded simultaneously) relates to the next, and how the chords progress from the first chord in a phrase of music to the last."[127] Translated, this divides harmonic structure into several components.

Melodies are "accompanied" by chords and chord progressions. These chords give the melodic content a particular shape, depth, and texture, as well as influence the general character of the work.[128] Harmonic indications determine the key in which the piece is written and whether the piece is written in a major or minor mode.[129] Harmonic sophistication is an indicator of originality; its

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available sounds.

[126] There are only seven octaves on the piano; other instruments or voice types are significantly more limited.

[127] *Repp*, 858 F. Supp. at 1298 n.7 (quoting Dr. Lawrence Ferrara, professor of music at New York University).

[128] As noted above, melodies can have a unique character; however, the harmonic structure determines the character of the composition as a whole (although it can also influence a listener's perception of thematic material).

[129] *See Repp*, 947 F. Supp. at 113 (supporting the notion that the simplest way to understand the concept of mode—as that term is most often used in copyright actions—is to connect major modes with "happy sounds" and minor modes with "sad sounds," although this is oversimplified to say the least).

duplication in an allegedly infringing work will be subject to heightened judicial suspicion.[130]

As with allegations of melodic similarity, most musical experts begin an analysis of the harmonic parallels between two works with non-specific allegations of a general nature, gradually refining the examination until reaching a highly focused level of harmonic specificity. The first, and most general, allegation proffered by musical experts is a familiar one: a large number of similar chords are present in both pieces.[131] Of course, chords are not protectable; thus, the plaintiff must prove that a large number of chords have been lifted, either in their entirety or with only minor changes. Courts here have indicated a willingness to follow the quantitative approach described above. Thus, similarity will be judged by the number of similar chords found in both works.

In assessing striking similarity, the number of common chords must inevitably be greater (absent the unlikely event that the copyrighted work presents some note combination that literally no one else has ever used and the defendant copied that exact combination). The court may also look for evidence that the chords are structured in precisely the same fashion.

For instance, chords that are combinations of three notes can be presented in root position or in one of two inversions. In root position, the chord is stacked in intervals of a third (the interval between both the bottom note and the middle note and the middle note and the top note is a third). A first inversion chord occurs when one takes the bottom note of a root position chord and displaces it by an octave so that it is now the highest note in the chord. Second inversions are constructed similarly by taking the first inversion chord and displacing the bottom note by an octave so that the note that was on bottom is now on top.

Inverting chords is probably the most common harmonic technique; all musical genres are replete with examples of chord inversions. Whether a particular chord that is common to both compositions is notated in the same inversion in both may be highly relevant to the similarity inquiry. A court that would probably uphold a finding of substantial similarity would likely do so on the basis of identity between chords, even where the chords appear in different inversions. However, a difference in inversion may well affect the court's assessment of similarity if the plaintiff is claiming that the similarities should "strike" the court's eye and ear.[132]

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[130] *Id.*

[131] *Id.* at 112; *Tisi*, 97 F. Supp. 2d at 543 (noting the use of chords with "certain common characteristics").

[132] *See generally Tisi*, 97 F. Supp. 2d at 543-44 (giving an exceptionally thorough analysis of the similarities and differences in the chord structures of the at-issue works).

Quite often, plaintiffs will assert that, not only the individual chords, but also the chord progressions contained in certain passages of both works are similar.[133] The plaintiff must allege more than a mere similarity between chord progressions, for many courts have held that chord progressions of the type mentioned here are simply too trite to be protectable.[134] Thus, to withstand the strict scrutiny of a striking similarity inquiry, not only should the progressions be nearly identical in both works, but the progressions must also have something unique within their structure that captures the court's attention.

One example of the chord progression uniqueness needed to justify a conclusion that two compositions are strikingly similar is found in *Gaste v. Kaiserman*.[135] There, the plaintiff, an "obscure" French composer, claimed that one of his songs had been impermissibly used as a model for the song "Feelings," written and recorded by international singing star Morris Albert.[136] A jury found for the plaintiff, holding that the songs were so strikingly similar that defendant's access to the material should be inferred.[137] The Second Circuit affirmed the jury's findings, holding that the evidence was sufficient to allow the jury to infer access based on striking similarity.[138]

The Second Circuit was particularly impressed by the plaintiff's evidence of what it termed a "unique musical 'fingerprint.' "[139] The musical device used in both compositions was a unique chord progression (in the expert's terms, an "evaded resolution") which modulated from one key to another.[140] The court noted that the harmony progressed from the penultimate chord into a new key in a very original and creative fashion, causing the plaintiff's expert to posit that "he had never seen this particular method of modulation in any other compositions."[141] The expert used a very effective analytic tool in justifying his conclusions: he first noted the "normal" manner in which a progression would resolve into a new key, and then proceeded to show how this particular manner of resolution was genuinely creative.[142]

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[133] Chord progressions are the connections from one chord to the next, with an eye toward the cadence (or end) of the progression and how the harmony changes along the path.

[134] *See, e.g., Tisi*, 97 F. Supp. 2d at 543-44 (noting harmonic progression used in both compositions so common as to be "found in songs in all genres"); *McRae*, 968 F. Supp. at 566 (stating that chord progressions found in both compositions "are the most common chord progressions in all of the music of Western civilization").

[135] 863 F.2d 1061, 9 U.S.P.Q.2d (BNA) 1300 (2d Cir. 1988).

[136] *Id.*

[137] *Id.* at 1063.

[138] *Id.* at 1068.

[139] *Id.*

[140] *Gaste*, 863 F.2d at 1068.

[141] *Id.*

[142] *Id.* at 1068. It should be noted here that, while the plaintiff's expert opined that every measure

The *Gaste* decision provides a close look at one specific type of harmonic evidence a court has found persuasive in the striking similarity context. Conversely, several decisions provide the basis for rejecting as unproductive other types of evidentiary allegations. The foremost of these is an allegation that both pieces were written in the same key or contain the same key signature. Courts almost uniformly reject this type of evidence for two reasons. First, setting a work in a particular key is conceptually difficult to classify as expression.[143] Second, even if a judge believes that key choice can evidence some creativity, the musical idea giving rise to the choice is virtually inseparable from the expression.

Key choice can, however, sustain or defeat substantial similarity (and possibly even striking similarity) when a work at issue contains instruments or voice types performing in differing keys simultaneously. For instance, in *Acuff-Rose Music, Inc. v. Campbell*,[144] the defendants, the rap group 2 Live Crew, were accused of misappropriating sections of Roy Orbison's hit song "Oh, Pretty Woman." The district court's decision to grant summary judgment in favor of the defendants ultimately turned on the qualification of the 2 Live Crew version of "Pretty Woman" as a parody within the meaning of the fair use doctrine;[145] however, before applying the fair use factors, the court heard testimony regarding whether the two versions were similar.[146]

In its evidentiary findings, the court noted the occurrence of key simultaneity in the 2 Live Crew version.[147] An expert for the defendants testified that, while the chorus of the song was written and performed in A Major, the lead vocalists were singing (rapping) in B Major, giving the entire song a "comic" aspect.[148] In the court's opinion, this modification established a significant dissimilarity between the two versions.[149]

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of the infringing work "cannot be traced back to something which occurs in" the infringing work, the Second Circuit essentially based its holding on this singular (though admittedly powerful) evidentiary finding. *See supra* note 103 and accompanying text.

[143] *See supra* note 85. This contention is actually less certain than it might first appear. There are artistic considerations underlying the choice of key signature, as indicated above.

[144] Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150, 18 U.S.P.Q.2d (BNA) 1144 (M.D. Tenn. 1991), *overruled on other grounds by* Acuff-Rose Music, Inc. v. Campbell, 972 F.2d 1429, 23 U.S.P.Q.2d (BNA) 1817 (6th Cir. 1992).

[145] 17 U.S.C. § 107 (2002).

[146] *Acuff-Rose*, 754 F. Supp. at 1156; *see also* Acuff-Rose Music, Inc. v. Campbell, 972 F.2d at 1433.

[147] *Id.*

[148] *Id.*

[149] It is not unheard of for Twentieth Century classical composers to employ different key signatures simultaneously within the same piece. For instance, Prokofiev once wrote a piano piece in which the left hand played in one key and the right hand in another. *See* "Allegro precipitato" from *Sarcasms, Op. 17, in* SERGEI PROKOFIEV, SELECTED WORKS, VOLUME II, 12-15 (Pavel Lukyanchenko ed., Kalmus Publishers, 2000). This type of harmonic variance is certainly unique;

Any potential similarity between the "mode" in which the two pieces are set can be valuable to a plaintiff, but only as a supporting, and not a primary, allegation. The truth of this statement lies in the fact that, when courts are addressing modes, they most frequently mean that the key in which a piece is set is either major or minor,[150] and since there are only two of these "modes" upon which to rely, the court will likely deem it little more than coincidence that two compositions share the same mode. However, where the more creative harmonic devices employed in a work are alleged to have been copied, the fact that the pieces also share the same mode can lend further credence to a finding of similarity.[151]

To this point, our discussion of harmonic similarity has focused on those elements which could be labeled rudimentary, or common to every musical work: duplication of chords, chord progressions, key signature, and mode. Courts have, in the harmonic context, employed one level of analysis that is more subtle. In assessing the similarities between "Till You" and "Close Every Door," the District Court for the Southern District of New York considered the overall quality of the harmonic content contained in each song.[152] The court found a high level of compositional sophistication in "Close Every Door," with Webber having used complex harmonic devices.[153] This level of harmonic sophistication made the simplistic compositional techniques used in "Till You" creatively distinguishable, and the overall character of the pieces dissimilar.[154] Note that this approach focuses not on the specific harmonic choices made by the composer but on the artistic level at which those choices are capable of being made.[155]

D. RHYTHMIC AND STRUCTURAL CONTENT

When deciding whether a protected composition has been copied, courts tend to place primary emphasis on the similarities of melodic and harmonic content

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it seems likely, however, that, under the stringent application of a striking similarity test, the plaintiff would be required to demonstrate that the defendant had copied not only the uniqueness of the idea, but also the specificity of the expression.

[150] There are, of course, other musical definitions for the term "mode" which could bear on the question of similarity. Because the term mode has not been defined to include any of the other potential musical meanings in any cases known to this author, these potential meanings and their implications for a similarity inquiry are not discussed.

[151] *See Tisi*, 97 F. Supp. 2d at 543-44; *Repp*, 947 F. Supp. at 113 (illustrating cases where similarity of mode influenced the court's decision).

[152] *Repp*, 947 F. Supp. at 113.

[153] *Id.*

[154] *Id.*

[155] *See also Tisi*, 97 F. Supp. 2d at 544 (noting that the harmony of defendant's composition is "more complex, nuanced, and dissonant" than that included in the plaintiff's composition).

shared by the two works. Because of that tendency, there is less judicial commentary on either the rhythmic or structural similarity between compositions. Nevertheless, similarities in these two general categories will receive some judicial attention and can bolster a plaintiff's claims.

Rhythm, as defined in the case law, "is determined by the time value of notes and silences."[156] The important components of rhythm are tempo, note value and silence, and symmetry. One assesses rhythmic similarity by comparing these elements.[157]

First, a plaintiff will likely allege that the note values[158] prevalent in his copyrighted composition are also present in the defendant's work.[159] Courts tend to find this argument lacking in force unless the allegation also includes evidence that the common note values are placed in identical symmetrical positions. Melodic symmetry has been discussed in great detail above; suffice it to say that all of the arguments regarding melodic symmetry apply with equal magnitude when one is discussing rhythmic symmetry. The range of common note values is quite limited (whole notes, half notes, quarter notes, eighth notes, etc.); on that basis, the court will probably be unsympathetic to allegations that note values themselves have been copied.[160]

However, evidence that rhythmic values have been copied in exact symmetrical positions is much more powerful. For instance, the *Repp* court credited expert testimony noting not only an identity between the note values presented in the opening passages of both works, but also the identity of the placement of these note values (most notably, the first three pitches of both songs).[161] Because of its potential lack of originality, this evidence will not be particularly strong under the scrutiny of a striking similarity inquiry unless the duplication of exact note values is voluminous.[162]

Time signature is extremely generic and leaves little room for artistic choices by the composer. Although copyright actions contain general allegations of time signature duplication,[163] courts usually do not emphasize their potential

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[156] Repp v. Webber, 858 F. Supp. at 1297 n.7 (quoting Dr. Lawrence Ferrara).

[157] *See* CHRISTINE AMMER, THE HARPER DICTIONARY OF MUSIC 357 (2d ed. 1987) (breaking rhythm into pattern, beat and speed).

[158] *Id.* at 164. The term "note value" refers to the length of time each note is sustained.

[159] *E.g.*, *Repp*, 947 F. Supp. at 105; *McRae*, 968 F. Supp. at 559.

[160] This is true unless the note value itself represents some creative energy on the composer's part, such as when a composer writes using beat divisions uncommon to a particular genre (as in frequent use of 128th notes).

[161] *Repp*, 947 F. Supp. at 105.

[162] *See* Allen v. Walt Disney Productions, Ltd., 41 F. Supp. 134, 137 (D.N.Y. 1941) ("[S]imilarities . . . must do more than engender a suspicion of piracy; they must establish piracy with reasonable certainty.").

[163] *E.g.*, *Repp*, 947 F. Supp. at 105; *Allen*, 41 F. Supp. at 137.

influence.[164] Nonetheless, striking similarity could be demonstrated where a time signature was highly unusual and exactly duplicated.[165]

Tempo refers to the speed at which a composition is performed, including any variances on the tempo contained in the work. Courts have disagreed regarding the meaning and parameters of the term "tempo" in musical infringement cases. In some cases, tempo is defined by the overall structure or style of the work. For instance, in *McRae*, the tempos of the two at-issue works were defined by their overall structure and style (what the court called a country "two-step").[166] By contrast, most musical experts believe that the actual tempo of a work is denoted by the composer at the beginning of the piece.[167]

Regardless of how the court defines tempo, its commentary on the subject is likely to be scarce. The expression of a tempo is even more difficult than time signature to separate from its constituent ideas. Striking similarity probably could only be demonstrated where the tempo marking was either sufficiently exaggerated or its phrasing was highly unique.[168] Note again that the presence of a striking similarity between the rhythmic components of two works turns on the level of creativity exhibited in the copyrighted work and the quantity of identity that can be proven in the infringing work.

The structure of a composition can vary in an infinite number of ways, a large number of which have been utilized by composers in the development of Western music. Certain classical and popular forms have been repeatedly explored by composers throughout the past five centuries.[169] Thus, the format of the copyrighted work must be highly creative and that creativity must be sufficiently plagiarized by the defendant before the similarities will rise to the level of legally striking.

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[164] *Allen*, 41 F. Supp. at 137-38.

[165] AMMER, *supra* note 157, at 442. "Normal" time signatures include 2/4, 3/4, 4/4 (also known as common time), 6/8, and 9/8. If one were to compose in an extremely "abnormal" time signature such as 122/8 or 76/4, and that signature were exactly duplicated, this would be helpful in establishing striking similarity.

[166] 968 F. Supp. at 566-67.

[167] Examples of tempo markings commonly used in classical musical compositions include allegro, adagio, moderato, and presto.

[168] For instance, the Twentieth Century composer Vincent Persichetti is known for his unique tempo markings. *See* "Fourth Piano Sonata, Op. 36," *in* VINCENT PERSICHETTI, PIANO SONATAS (COMPLETE), 63-98 (Elkan-Vogel, Inc., 1988). The sonata includes one movement whose tempo is marked "Intimately," *id.* at 65, and another marked "Plaintively," *id.* at 85.

[169] Classical sonata form fits into this category, and was employed by Haydn, Mozart, and Beethoven, among others. In popular music, one court notes the recurrence of the verse-chorus-verse-chorus form. *See McRae*, 968 F. Supp. at 567 (noting that verse-chorus-verse-chorus is "one of the most common in country music").

As in both melodic and harmonic comparisons, courts will probably begin a structural comparison of two works by measuring the empirical boundaries of each. For instance, the *McRae* court noted how many chord changes were contained in each of the at-issue works.[170] Similarly, the *Repp* court began its discussion of structural similarity by stating the number of measures contained in each work, the number of measures contained in the themes of each work, and the percentage of the overall composition that was represented by each theme.[171] While this type of comparison is almost identical to those enumerated in previous sections of this Note, what is not identical is its persuasive value. Where numerical comparisons of melodic, harmonic, and even rhythmic content are quite important in the court's formation of an impression on similarity, specific numerical comparisons of the length of pieces or themes are given less weight by courts.[172]

Repetition is one of the essential components of form. How themes, harmonies, and rhythms are repeated throughout the entirety of a piece is a subject of great interest in the similarity inquiry. For instance, in *Allen*, the plaintiffs alleged that their composition and the defendant's composition shared not only the same musical pattern (an extremely common form), but also the exact placement of the thematic material within that pattern.[173] Likewise, in *Repp*, thematic placement played a prominent role, as the musical experts divided the pieces into two large sections and compared each for the location of melodic content.[174] Note that this adds a significant new layer to the striking similarity claims: plaintiffs might be required to prove that the thematic material is the same, that it is repeated in an identical symmetrical pattern, that it is harmonized in a near identical fashion, and that the theme recurs in a similar position in the formats of both songs.

Of course, not all musical forms are commonly used, and proving that a defendant copied an unusual pattern could be highly influential in the striking similarity inquiry. Very few cases have considered this question; thus, there is no real possibility for commentary on the level at which a form must be original for its copying to qualify as striking.[175] The complexity of a particular form could play

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[170] 968 F. Supp. at 566.

[171] 947 F. Supp. at 112.

[172] For instance, in *Repp*, the fact that "Close Every Door" was comprised of 108 measures whereas "Till You" contained only 78 measures had no effect on the court's decision. *Id.* at 112, 115-16.

[173] 41 F. Supp. at 137.

[174] 947 F. Supp. 112-13.

[175] *See, e.g., Tisi*, 97 F. Supp. 2d at 543 (noting that any structural similarities between two songs are unprotectable because they are "uniformly shared with most modern popular rock music").

a significant role in determining this question as well; again, however, there is little judicial commentary available on the subject.

To summarize, both rhythmic and structural comparisons have their own unique places within a similarity inquiry, and each can aid a plaintiff whose case is already strong. However, each occupies a smaller portion of the court's time because of the greater possibility that the composer's true artistic choices will have been made at either the melodic or harmonic level. Where rhythmic or structural similarity is alleged, the harsh nature of the striking similarity inquiry requires that the copyrighted work contain a high level of creativity and the infringing work a high level of identity among the allegedly copied passages.

IV. CONCLUSION

To most courts, the differences between substantial and striking similarity involve threshold questions of verifiable quantity: what quantity of pitches, rhythms, and/or harmonic devices are comparable, i.e., how much of the piece may be appropriately compared. Obviously, the easiest distinction between striking and substantial similarity involves this assessment: the greater the quantity of proper comparisons, the more likely a court will position itself to find two compositions strikingly similar.

There are two more concepts that generally enter into the court's similarity probe. The first centers around originality: how creative is the copyrighted work? If it is not highly unique under one or more of the enumerated categorical analyses, the chances of finding even substantial similarity between the two works are small (although, admittedly, the originality threshold for substantial similarity is lower). Second, there is the question of how much actual identity is found in the infringing work. The threshold for identity between the passages of the two works has been left unsettled; of course, a court is more likely to require identity in the striking similarity context, but that statement is obvious and not very helpful. Close identity between two works can be lacking and yet a court could still find substantial similarity; however, it is doubtful that a court would find two works strikingly similar if they do not share passages that are not only common, but also nearly identical.

Thus, one formulation for striking similarity could read something like this: quantity + creativity + identity = striking similarity. Quantity is the threshold issue; without a substantial quantity of common passages, the court will not look further. If the quantity prong is met, the court will consider the uniqueness of the work, with an eye toward the copyrighted composition's unusually creative portions. Assuming that such originality exists, the court will then consider whether the unique portions have been duplicated in their entirety or simply

modeled. The more identity can be proven, the greater the likelihood that striking similarity will be found.

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