

# HOW TO COPY A SONG WITH IMPUNITY: A LEGAL PERSPECTIVE ON COPYRIGHT INFRINGEMENT CASES FOR MUSICAL WORKS

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## Declaration

By submitting this research paper, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

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## **Abstract**

Music has, and continues to play, an important role in society. It is therefore natural that more music composers enter the scene to capitalize upon this role that music has in society. It is however becoming more common place for music composers to start copying each other, either directly or indirectly. Fortunately, copyright laws have been developed to further protect the rights enjoyed by copyright holders, such as music composers, and these laws essentially protect the composers from the unlawful reproduction of their original music. Copying is, to some degree, inevitable, therefore, the question asked by this paper is to what extent is someone entitled to 'copy' from another person without it amounting to copyright infringement.

In determining if there is copyright infringement, two tests must be applied and satisfied, namely, the causal connection test, and the substantial similarity test. Causal connection is usually met by establishing whether the alleged infringer had access to the original work. The substantial similarity test is the focus of this paper. The courts rely on this test to determine if that part which was reproduced from the original work is of substance i.e. if it is a part of the work which attributes uniqueness and quality to the original song. Of course, this test is notoriously difficult to understand and apply, hence the need for this paper to address the question on when there is substantial similarity in two works. This paper is of benefit to academics, authors (musicians) and lawyers, as not only is the substantial similarity test discussed from a theoretical point of view, but the question of when something is substantially similar is answered from a pragmatic point of view. It is hoped that this paper is used as a guideline in understanding and applying the substantial similarity test in music copyright infringement cases.

*To my friend Dr Kate Davies for her help in proofreading and editing this paper*

## Table of contents

1	Introduction .....	1
2	The <i>sui generis</i> nature of musical works .....	4
3	Causal connection .....	7
3 1	Subconscious copying .....	8
3 2	The internet .....	11
4	Substantial part .....	12
4 1	“any substantial part” .....	13
4 1 1	Quality versus quantity .....	14
4 1 1 1	Assessing the valuable portions in copyrighted works .....	17
4 2	Methodologies used to determine if a substantial part has been reproduced .....	28
4 2 1	The lay listener test .....	28
4 2 1 1	The audience test .....	32
4 2 2	Expert witnesses .....	34
4 2 2 1	Expert assisted audience test .....	38
4 2 3	Prior art .....	40
4 3	Alternative defences .....	41
4 3 1	Fair dealing .....	41
4 3 2	De minimis .....	42
4 3 3	Scènes à faire .....	43
4 3 4	Estoppel .....	44
4 3 5	Unclean hands doctrine .....	44
4 3 6	Independent creation .....	44
5	Proposal for a standardised approach in music infringement proceedings .....	45
6	How to copy a song with impunity .....	47
7	Conclusion .....	49
8	Bibliography .....	52

## 1 Introduction

Copyright is the most important type of protection available to musicians. It has even been boldly asserted that “the recording industry is built on copyrights”.<sup>1</sup> Without copyright, there is very little protection available to musicians and producers. A classic example of a music infringement case is the notorious case concerning the artist Vanilla Ice, who allegedly reproduced a substantial part of the song “Under Pressure”<sup>2</sup> by the rock band Queen in his own song “Ice Ice Baby”.<sup>3</sup> Listening to the introduction of both songs, it quickly becomes apparent that Vanilla Ice’s song sounds almost identical to Queen’s song. The producer of “Ice Ice Baby”, Rob Van Winkle, after much public criticism and a law suit filed against him, finally admitted to copying Queen’s opening riff and paid them a lump sum out of court.<sup>4</sup> This is the type of infringement this paper will focus on.

This is just one example of a case where one author has claimed copyright infringement in their music by another author. Other well-known cases include: the alleged infringement of Marvin Gaye’s “Got to Give it Up” by the 2013 pop sensation Robin Thicke in his song “Blurred Lines”;<sup>5</sup> Joe Satriani’s song “If I Could Fly” was allegedly infringed by one of the biggest bands in the world, Coldplay, in their song “Viva La Vida”;<sup>6</sup> and even The Beatles were accused of copying substantial portions of Chuck Berry’s song “You Can’t Catch Me” in their widely popular song “Come Together”.<sup>7</sup> There are countless other cases that serve to prove that music infringement cases are dealt with on a recurrent basis, not only in current times, but also dating as far back as the 18<sup>th</sup> century when Bach had to protect his music from unauthorised publication.<sup>8</sup> Music infringement cases are however more prevalent in

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<sup>1</sup> S Mulhane-Clements “The impacts of the differences between UK and US copyright laws for sound recordings on musicians” (2010) 48 *Management Decision* 1388 1389.

<sup>2</sup> <https://www.youtube.com/watch?v=a01QQZyl-I>.

<sup>3</sup> <https://www.youtube.com/watch?v=rog8ou-ZepE>.

<sup>4</sup> K Stillman “Word to your mother” (27-02-2006) *IOWA State Daily* <[http://www.iowastatedaily.com/news/article\\_766d27d2-dc56-5ff3-9040-47e44d46094f.html](http://www.iowastatedaily.com/news/article_766d27d2-dc56-5ff3-9040-47e44d46094f.html)> (accessed 2-07-2014).

<sup>5</sup> Anonymous “Gaye’s family take on Thicke and EMI” (2013) *Music Law Updates* <<http://www.musiclawupdates.com/?p=5595>> (accessed 30-06-2014).

<sup>6</sup> D Kreps “Joe Satriani Sues Coldplay for ‘Viva La Vida’ Plagiarism” (5-12-2008) *Rolling Stone Music* <<http://www.rollingstone.com/music/news/joe-satriani-sues-coldplay-for-viva-la-vida-plagiarism-20081205>> (accessed 30-06-2014).

<sup>7</sup> J C Self “Lennon v. Levy – The ‘Roots’ Lawsuit” (2-10-2011) *Abbeyrd’s Beatles Page* <<http://abbeyrd.best.vwh.net/lenlevy.htm>> (accessed 30-06-2014).

<sup>8</sup> *Bach v. Longman* 98 Eng. Rep. 1274, 1275 (K.B. 1777).

the 21<sup>st</sup> century due to technological advancements which allow authors to have access to all music, and to be able to copy and rerecord music without much effort.<sup>9</sup> Furthermore, copyright is being used more often nowadays than it has been used in the past to protect musical works.<sup>10</sup> This is no doubt a result of these same technological advancements.

The problem underlying music infringement cases, particularly where one author is accused of taking a substantial part of another's work, is in trying to determine what constitutes a substantial part. There are no clear cut points to determine whether or not a substantial part of a song has been reproduced.<sup>11</sup> For example, in the previously mentioned Queen case, only two bars of the introduction were reproduced and repeated in Vanilla Ice's song, yet this undoubtedly amounted to infringement. However, in another case,<sup>12</sup> the court found that no substantial part had been taken despite the senior work and the junior work both being in the same key, both having the same chord progression in the introduction and verses, and both have a similar song structure.<sup>13</sup> This highlights the inconsistency of the substantial part test, and how it is applied.

The substantial part test is one of the legs in the two legged test for determining if copyright infringement has taken place. Without this step, copyright infringement cannot be proved and the case will be discarded. It is therefore important for any practitioner to satisfy the requirement that a substantial part has been taken. This again presents a problem as to when exactly a substantial part has been taken as it is a matter of judicial interpretation by the court. This paper will focus on this leg of the test in detail and how the courts, in different jurisdictions, have applied it. This paper hopes to find a result by looking at common patterns used in determining if a substantial part has been reproduced, so that both the lawyer and the musician can be more aware of whether their song, or their client's song, crosses the figurative border between a non-substantial part reproduced and a substantial part reproduced.

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<sup>9</sup> B Mencher "Digital Transmissions: To Boldly Go Where No First Sale Doctrine Has Gone Before" (2002) 10 *UCLA Ent. L. Rev.* 47 57.

<sup>10</sup> M Livingston & J Urbinato "Copyright Infringement of Music: Determining Whether What Sounds Alike Is Alike" (2013) 15 *Vand. J. Ent. & Tech. L.* 227 230.

<sup>11</sup> J K Christian "Too Much of a Good Thing? Deciphering Copyright Infringement for the Musician" (2004) 7 *Vand. J. Ent.L. & Prac.* 133 133.

<sup>12</sup> *Tisi v. Patrick* 2000 97 F.Supp, 2d 539.

<sup>13</sup> 543.

A significant amount of this paper will consider US case law, specifically how the US courts have dealt with copyright infringement of musical works. The US have generally been criticised for their late ratification of the Berne Convention.<sup>14</sup> The US, prior to ratification of the Convention, have clearly demonstrated their reluctance towards ratification, and there was a great deal of negotiations before the US finally ratified the treaty.<sup>15</sup> This reluctant attitude can also be seen in how the US apply their copyright laws in a slightly different way to those of the other Berne signatories. Despite the fact that this paper focuses predominately on US case law, the US law must be approached with circumspection, and the principles enunciated throughout this paper must be viewed as aids for the courts, rather than concrete tests themselves. The US have dealt with a much larger volume of musical infringement cases than any other jurisdiction, and the tests applied in their courts have generally resulted in consistent outcomes. Therefore, it is for this reason, and the fact that the US has such an extensive history of music infringement cases, that this paper predominately focuses on the approaches used in their courts.

Although this paper is written from a South African point of view, the findings will also be relevant for other jurisdictions. Most countries, specifically the relevant countries with regard to music infringement, are all signatories of the Berne convention.<sup>16</sup> The Berne convention creates a universal copyright law which is applied by all member states.<sup>17</sup> This essentially means that the signatories of the Berne convention have to abide by the same copyright law principles so as to be in line with the Berne convention's purpose of a universal copyright law. Therefore, the research in this paper will be relevant for all other Berne signatories.

Lastly, this paper will consider the other facets relevant to music infringement. Although the main focus will be on the substantial part test, this test cannot be studied in isolation. This paper will consider contentious issues surrounding the causality test, a test which is equally important in copyright infringement cases, as well as possible

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<sup>14</sup> B A Ringer "The Role of the United States in International Copyright – Past, Present, and Future" (1968) 56 *GeoLJ* 1050 1051.

<sup>15</sup> H R Sandison "The Berne Convention and the Universal Copyright Convention: The American Experience" (1986) 11 *Colum. VLAJ.L.Arts* 89 96.

<sup>16</sup> The Berne Convention for the Protection of Literary and Artistic Works 1886.

<sup>17</sup> C Colombet *Major Principles of Copyright and Neighboring Rights in the World: A Comparative Law Approach* (1987) 5-6; S Monseau "Fit for Purpose': Why the European Union Should Not Extend the Term of Related Rights Protection in Europe" (2009) 19 *Fordham Intell. Prop. Media & Ent. L.J.* 629 637.



defences available to those who have been found to be infringing. This paper will then provide a condensed chapter on how to avoid infringing upon another's work.

It is important to also understand those aspects of a musical work which make it both unique and a challenge when dealt with in a copyright infringement case. As will soon be seen, music is not like any other type of work, and requires a different set of skills in order to determine whether or not copyright infringement has indeed taken place. With that in mind, a discussion of the characteristics of musical works which makes it a unique type of work will occur so as to have a proper understanding of the specific rights available.

## **2 The *sui generis* nature of musical works**

When an author writes a book, he receives copyright protection due to the book being a protectable type of expression, namely, a literary work. If an artist paints a picture, they too will receive copyright protection as their work, the painting, is protected as an artistic work. When a musician composes a song, they can get up to three types of copyrights in their work. The musician will obviously receive protection on the grounds that their song is a musical work. However, if their song features lyrics, the lyrics will receive protection as a type of literary work, and finally, the recorded version of the song will receive protection as a sound recording.<sup>18</sup> Assuming that the musician is the author of all these different works, he receives three copyrights whereas authors of other types of work ordinarily receive one.<sup>19</sup> The US courts have confirmed this position, namely that with a musical work, the lyrics of the work will receive a separate copyright protection from that of the music.<sup>20</sup> There is a possibility of a fourth right in the nature of copyright, namely performance rights,<sup>21</sup> but this only becomes relevant with the live performance of the song.<sup>22</sup> It is however still a right which the author of the musical work may exercise if he also performs the song.

Not only can an author of a musical work have up to four 'copyrights', but each of the rights can be held by the same person, or be assigned to different people,<sup>23</sup> except

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<sup>18</sup> C Eppler "These Are the Breaks: Applying the Newton Test in a New Context to Provide Protection for Rhythmic Material in Musical Works" (2011) 42 *U. Mem. L. Rev.* 413 428.

<sup>19</sup> Monseau (2009) *Fordham Intell. Prop. Media & Ent. L.J* 640.

<sup>20</sup> *Mills Music, Inc v. State of Arizona* 1975 WL 21095 12.

<sup>21</sup> O H Dean *Handbook of South African Copyright Law* 14ed (RS 2012)1-191.

<sup>22</sup> Monseau (2009) 19 *Fordham Intell. Prop. Media & Ent. L.J* 640.

<sup>23</sup> 640.

for the performer's rights. The Performers' Protection Act 11 of 1967 does not contain a provision which allows for the assignment of performance rights, therefore, it is accepted that this right cannot be assigned.<sup>24</sup> Therefore, the copyright of the musical work can be held by the author, while the copyright of the sound recording can be held by a record label.<sup>25</sup>

Another aspect of music which separates it from other types of works is that a song is composed of various musical elements which work together to create one song.<sup>26</sup> Each of these components, such as the guitar riff, the vocal melody, the bass lines and the lyrics may all be capable of receiving copyright protection if they exist in isolation. Therefore, when examining a song, a judge looks at the song as a whole and not at the individual components which make up the song.<sup>27</sup> Even if some of the elements of the song are not capable of copyright protection, removing them from the song would alter the entire sound of the musical work.<sup>28</sup>

Music, unlike literary or artistic works, is limited by the number of note choices available to the musician.<sup>29</sup> In terms of western music theory, there are only twelve notes in the chromatic scale, which means music composers are limited within the borders of those twelve notes.<sup>30</sup> Furthermore, songs, especially westernised pop songs, are restricted by the musical theory of keys and tonality which limits composers to only eight notes. In terms of music theory, a key has eight tones, and these tones have to interact together in order to sound pleasant to the discerning ear.<sup>31</sup> It is very uncommon, especially in pop music, to play notes outside the key. It is possible to change the key throughout the song, but again, each key is restricted by the eight notes which dictate what key the song is in. Because of this limitation, as well as the use of a 'pop music formula' which dictates how a good song should sound and what combination of notes should be used to sound the most pleasing to the listeners ears,

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<sup>24</sup> Dean *Handbook of South African Copyright Law* 1-200.

<sup>25</sup> Monseau (2009) 19 *Fordham Intell. Prop. Media & Ent. L.J* 640.

<sup>26</sup> N Ahmad & S Chaturvedi "Originality requirement and copyright regime of music: a comparative overview of Indian perspective" (2013) 22 *Info. & Comm. Tech.L.* 132 134.

<sup>27</sup> 134.

<sup>28</sup> 140.

<sup>29</sup> *Darrell v. Joe Morris Music Co., Inc.*, 1940 113 F.2d 80 80; Christian (2004) *Vand. J. Ent. L. & Prac* 133.

<sup>30</sup> *Marks v. Leo Feist, Inc.* 1923 290 F.959 960. The court in *Marks v Leo Feist* refers to thirteen notes, although it is more commonly accepted to refer to twelve notes in the chromatic scale, as the first note and the thirteenth note are the same albeit an octave apart.

<sup>31</sup> Livingston & Urbinato (2013) *Vand J Ent & Tech. L.* 240-241.

there will be an increase in songs which sound similar.<sup>32</sup> Judges must be aware of this limitation when deciding upon music infringement cases. Because of this inherent limitation, musicians are expected to copy, or rather, allow themselves to be influenced by other artists to a degree, and to draw from a common pool of creative resources from which they write their music.<sup>33</sup> The issue only comes in when they take too much without giving the appropriate recognition to the artist. Music differs from, for example, literary works in this regard, because if you take a small part from a book without giving credit, it will be considered “plagiarism”.<sup>34</sup> But the same is not always true when musicians reproduce small parts of other songs.

Perhaps a more obvious difference with regard to musical works and sound recordings is that they can only be appreciated by listening through the ear. The other works require sight to appreciate, but music is the only type of work that makes use of the ear.<sup>35</sup> Music therefore responds differently to the consumers who are forced to appreciate it in an isolated manner, namely, through the ears, and this means their experience with music will be different from their experience with other authorial works such as art or books.<sup>36</sup> This therefore means that in determining whether or not there has been infringement, the judge will have to make use of their ears and decipher whether or not the songs are similar. A determination of infringement, whether by the judge, or the layman, is done by listening to the music with the ears.<sup>37</sup> The *sui generis* nature of music will therefore have consequences in legal proceedings, as the court will have to make use of different methodologies and rely on expert witnesses in determining if there is music infringement.<sup>38</sup> It is not suggested that music infringement cases differ from any other copyright infringement claim, or that the criteria differ, but that due to the inherent differences between musical works and other copyright protected works, the court will need to approach music infringement cases from a slightly different angle. For example, the fact that music infringement is predominately

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<sup>32</sup> *Darrell v. Joe Morris Music Co., Inc* 80; Christian (2004) *Vand. J. Ent. L. & Prac* 133; See also *Marks v. Leo Feist, Inc* 960.

<sup>33</sup> A Sirois & S E Martin “United States copyright law and digital sampling: Adding color to great area” (2007) 15 *Info. & Comm. Tech. L* 1 7; Livingston & Urbinato (2013) *Vand J Ent & Tech. L.* 282.

<sup>34</sup> Sirois & Martin (2007) *Info. & Comm. Tech. L* 7; See also A Keyt “An Improved Framework for Music Plagiarism Litigation” (1988) 76 *CLR* 421 424.

<sup>35</sup> Livingston & Urbinato (2013) *Vand J Ent & Tech. L.* 230.

<sup>36</sup> 262.

<sup>37</sup> 272.

<sup>38</sup> 230.

determined by listening through the ears is already a difference, as other works require a visual appreciation to notice any possible infringement.

### 3 Causal connection

Copyright infringement cannot be found without satisfying this leg of the test, namely, that there is a causal connection between the junior work and the senior work. To satisfy this leg, the claimant must usually in the first place show that the infringing party had access to the copyrighted work.<sup>39</sup> This test looks at the source of the infringing work, ie, where it derived its similarities from.<sup>40</sup> The court must then determine if the similarities derived as a result of the defendant having copied the plaintiff's work (a causal connection), or if such work was developed independently of the plaintiff's work.<sup>41</sup> It is not always possible to catch someone in the act of copying, therefore, the causal link test is satisfied by the use of circumstantial evidence.<sup>42</sup> The plaintiff would usually need to establish that the defendant had access to the plaintiff's work, and that there is a degree of similarity between the two works.<sup>43</sup> But where the similarities between the two works are so close, access will not necessarily need to be proved. The higher the degree of similarity between the two works, the more likely it is that there is a causal connection. It is possible that a judge can make a finding that there is a causal connection based on the similarities alone, but only if the similarities are so close that there is no other explanation but through access of the work.<sup>44</sup>

This test is equally important in music infringement cases, and a claimant must prove that the infringing party had access to their music before they can succeed with their claim. Fortunately for copyright owners it is becoming increasingly easy to satisfy this test due to a range of reasons, two of which will be discussed below.

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<sup>39</sup> H Klopper, T Pistorius, B Rutherford, L Tong, P van der Spuy & A van der Merwe *Law of Intellectual Property in South Africa* (2011) 203.

<sup>40</sup> *Juta & Co Ltd v De Koker* 405 JOC (T) 423; *Galago Publishers (Pty) Ltd v Erasmus* 1989 1 SA 276 (A) 280.

<sup>41</sup> *Juta & Co Ltd v De Koker* 423.

<sup>42</sup> Livingston & Urbinato (2013) *Vand J Ent & Tech. L.* 258.

<sup>43</sup> 258.

<sup>44</sup> *Arnstein v. Porter* 1946 154 F.2d 464 469; *Baxter v. MCA Inc.*, 1987 812 F.2d 421 424.

### 3 1 Subconscious copying

This is a fascinating doctrine that was given due attention in the UK case of *Francis Day & Hunter Ltd. v Bron*:<sup>45</sup>

“Unconscious copying is not a contradiction in terms. It means reproduction amounting to an infringement. It means that a person has reproduced a substantial part of a copyright work, not because he looked at it, or thought of the original, but because it was at the back of his mind, or on his subconscious mind, from having heard it on the radio or elsewhere. Strictly speaking, it is a contradiction in terms, but it is a useful way of saying that the composer looked at the copyright work and took bits out of it, or that when he composed his own work he had the copyright work at the back of his mind and reproduced it subconsciously. Musical people have tunes in their minds which they can produce consciously; they also have tunes in their minds, which, when composing, they may reproduce subconsciously.”<sup>46</sup>

This could pose a problem for musicians who are accused of copying a song, as they may not even need to have direct access to the song which they allegedly copied, as long as they have heard it at some point before.<sup>47</sup> This doctrine will have serious repercussions for musicians if applied more extensively. A rationale in favour of this doctrine is that it is better to prejudice one party than to have both parties prejudiced. In other words, it would be wrong for a defendant who has a similar song to the plaintiff, to keep the song merely because the defendant denied copying it.<sup>48</sup> This places a reverse onus on the defendant to prove that he could not have copied it, whereas the plaintiff need only establish that it is possible that the defendant could have access to the original.<sup>49</sup> Perhaps a reason why this doctrine is not applied by all courts is due to the controversy surrounding the reverse onus. South African courts abide by the ‘he who alleges must prove’ principle, so it is no surprise that this doctrine has not yet been fully received in South Africa. However, the South African High Court has given some recognition to the concept of subconscious copying in *Hallmark Cards Inc v Prima Toys (Pty) Ltd*.<sup>50</sup> One of the parties allegedly saw a journal with drawings belonging to the applicant, but said that they had no conscious recollection of the drawings.<sup>51</sup> With regard to the infringement that occurred, the court said that “it does

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<sup>45</sup> [1963] Ch. 587.

<sup>46</sup> 597-598.

<sup>47</sup> W J Gordon “Towards a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship” (1990) 57 *U.Chi.L.Rev.* 1009 1031.

<sup>48</sup> *Francis Day & Hunter Ltd. v Bron* 598.

<sup>49</sup> 598.

<sup>50</sup> 219 JOC (T).

<sup>51</sup> *Hallmark Cards Inc v Prima Toys (Pty) Ltd* 222.

not require a conscious copying, it could even be innocent. Indirect copying is sufficient, *sub-conscious copying* is sufficient” (own emphasis).<sup>52</sup> UK decisions also carry a great amount of weight in the South African intellectual property law cases,<sup>53</sup> so at some point this doctrine of subconscious copying may become firmly ensconced as part of South African law.<sup>54</sup> Even if this doctrine is not applied in South Africa, the *Francis Day* case is testament to the fact that it has been applied in the UK, and there are several other situations where it has also been applied in the US.<sup>55</sup> Therefore, musicians who reside in either of these jurisdictions might be susceptible to the subconscious copying doctrine.

It was suggested by the court that when dealing with subconscious copying, a higher degree of similarity must be found between two works to prove that copying has occurred.<sup>56</sup> If conscious copying can be proved then, of course, a heightened degree of similarity is not required.

Another rationale for the application of this doctrine is that intention is irrelevant.<sup>57</sup> In the South African Copyright Act, knowledge is not a requirement for proving direct infringement.<sup>58</sup> Knowledge is only required when proving indirect infringement.<sup>59</sup> Therefore, whether a defendant had the intent to copy a song or not is immaterial.<sup>60</sup> For these reasons, subconscious copying must be treated in the same manner as deliberate copying.<sup>61</sup>

The difficulty underlying this doctrine is that it requires a consideration of the human mind, which is a very subjective and unpredictable undertaking.<sup>62</sup> Each person perceives things differently. So for some, they may be able to recall a song they listened to 20 years ago, whereas others will not be able to remember the song that just played on the radio. This will surely pose some threat to the doctrine, as it cannot

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<sup>52</sup> 223.

<sup>53</sup> *Galago Publishers (Pty) Ltd v Erasmus* 284G.

<sup>54</sup> The *Francis Day & Hunter Ltd. v Bron* decision is indirectly referred to with approval in the unreported case of *Topka v Ehrenberg Engineering (Pty) Ltd* 30 May 1983.

<sup>55</sup> *Fred Fisher Inc v. Dillingham* 1924 298 Fed.145; *Deutsch Lithographing Co. v. Boorman* 1926 15 F.2d 35; *ABKCO Music, Inc. v. Harrisongs Music, Ltd* 1983 722 F.2d 988 999; *Three Boys Music Corp v. Bolton* 2000 212 F.3d 477.

<sup>56</sup> *Francis Day & Hunter Ltd. v Bron* 599.

<sup>57</sup> 601.

<sup>58</sup> Section 23(1) of Copyright Act; Dean *Handbook of South African Copyright Law* 1-80.

<sup>59</sup> Section 23(2) of Copyright Act.

<sup>60</sup> *Hawkes and Son (London), Limited v Paramount Film Service, Limited* [1934] Ch. 593 602.

<sup>61</sup> *Francis Day & Hunter Ltd. v Bron* 601.

<sup>62</sup> 625.

be assumed that all people who hear a song will subconsciously remember it. This is a factor that judges must surely consider.

What some call 'subconscious copying' others might call 'influence'.<sup>63</sup> Musicians draw influence from each other, and without this influence, very little new music would be released.<sup>64</sup> If an artist hears a song in the past, and then writes a new song which resembles the original one, it may just be a matter of influence. Of course, this does not deny the existence of subconscious copying, but it does offer another way to view this doctrine. It is not suggested that the terms subconscious copying and influence are interchangeable, as they are most certainly not. It is possible for artists to compose songs that sound similar to other songs they have heard in the past, without them having been influenced by said songs or genre.

Musicians subject to this doctrine would be facing potential harm in the sense that their works will not be permitted to be used insofar as it infringes the senior work.<sup>65</sup> This means that all effort expended in composing a work would amount to little in the end, as the musician will not be able to use it as intended. Musicians can, and often do, enter licensing agreements with the senior author, which permit them to use their song without fear of prosecution, but this places the bargaining power in the hands of the senior author.<sup>66</sup> This doctrine places musicians in a precarious situation as they are now being penalized for hearing a song played in the past, regardless of whether they were aware of the song and the similarities it had to their song at the time of composition.

This doctrine also lessens the possibility of mere coincidence.<sup>67</sup> Copyright law protects original works when proof of copying is shown. However, where the creation of an identical work is in fact coincidental and without copying, then copyright will serve to protect and not deny the existence of the junior work.<sup>68</sup> It may also be possible that a junior author coincidentally composes a song which sounds similar to the senior work, even if the junior author had heard the senior song at some point. As discussed, the human mind is unpredictable, and its ability to store and recollect matter in the

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<sup>63</sup> Gordon (1990) *U.Chi.L.Rev* 1030.

<sup>64</sup> Keyt (1998) *CLR* 427.

<sup>65</sup> Gordon (1990) *U.Chi.L.Rev* 1029.

<sup>66</sup> 1029.

<sup>67</sup> 1030.

<sup>68</sup> Dean *Handbook of South African Copyright Law* 1-76.

subconscious differs from person to person.<sup>69</sup> Coincidences do occur in copyright law, and this doctrine detracts from the possibility of coincidence.

### 3 2 The internet

The internet has changed the way that copyright law operates.<sup>70</sup> Within seconds, content from all around the world is readily available to anyone with rudimentary computer skills. Musicians now have access to a massive catalogue of musical works which have been uploaded onto the internet via popular sites such as YouTube,<sup>71</sup> Soundcloud,<sup>72</sup> Spotify and many others.<sup>73</sup> Although this benefits the public at large, as more works are easily accessible, this does pose a threat to musicians in music infringement cases as they can seldom argue that they never had access to a song.

Technological advancement has changed the way that people access music, or any copyright work for that matter.<sup>74</sup> Before the internet, the only way people had access to music was by means of radio, concerts, TV, CDs, cassettes, vinyls and so forth. With the exception of CDs, cassettes and vinyls, people had no choice in what they listened to, and had to listen to whatever the radio DJs played, or whatever songs the artists at concerts chose to play. The internet has certainly changed this, especially with sites such as YouTube, where people can type in any artist they like and listen to their music for free for as long as they like. It is consumers who now have the power and the choice to listen to what they want, whenever they want to.

It is also becoming cheaper to make music, as musicians are no longer forced to go to expensive recording studios to record their music.<sup>75</sup> Instead, high quality recordings can be made from the comfort of one's home using inexpensive equipment.

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<sup>69</sup> Livingston & Urbinato (2013) *Vand J Ent & Tech. L.* 280.

<sup>70</sup> A Harrower "Copyright Issues in Internet Music" (2005) 24 *Contemporary Music Review* 483 483.

<sup>71</sup> <http://www.youtube.com>.

<sup>72</sup> <http://www.soundcloud.com>.

<sup>73</sup> <http://www.spotify.com>; other popular sites include "8tracks" <http://www.8tracks.com>; "Groove Shark" <http://www.grooveshark.com>; "MySpace" <http://www.myspace.com> and Google's streaming service which is ironically called "Google Play Music All Access" <https://play.google.com/about/music/allaccess/>.

<sup>74</sup> T Pistorius "Copyright Law and IT" in D van der Merwe, A Roos, T Pistorius & S Eiselen (eds) *Information and Communications Technology Law* (2008) 239 239; Harrower (2005) *Contemporary Music Review* 486.

<sup>75</sup> Harrower (2005) *Contemporary Music Review* 487.



This means that more music is being produced, and subsequently being uploaded onto the internet.<sup>76</sup>

Statistics reveal that as of 2011 more music is being listened to on the internet than it is on radio. In fact it was estimated that 21 billion songs were streamed on the internet in 2011, compared to the 158 million songs listened to on radio.<sup>77</sup> This indicates that copyright is moving to a digital realm as far as music is concerned.

The internet has “revolutionis[ed] how people access music”.<sup>78</sup> In music infringement cases, when dealing with the first leg of infringement, namely, the causality test, it is becoming increasingly difficult for infringing musicians to argue that they did not have access to a song. In infringement proceedings the senior author simply needs to adduce evidence indicating that their song is available on the internet, on a platform such as Soundcloud, and the causality test will be half met.<sup>79</sup> Of course, the defendant can always dispute having heard the song, but the fact that the song is available on the internet, and readily accessible to the defendant, will make it all the more difficult to defend the proceedings, especially if the junior work does in fact sound objectively similar to the senior work. Judges will of course always use their discretion in the matter. However, the fact remains that having a song which is easily accessible by the defendant on the internet will by no means strengthen the defendant’s position in infringement proceedings. Therefore, uploading music on the internet will not stand to benefit the defendant in infringement proceedings, but only harm them.

#### **4 Substantial part**

This is the focal point of the paper. In deciding if too much has been reproduced from an existing song, the judge must determine if those parts which were reproduced amounted to a substantial part thereof. This is no easy task, and often requires consideration of a range of factors. The difficulty lies in determining where the substantial part threshold lies, and at what point it has been crossed. Understanding where this figurative threshold lies will be of benefit to copyright holders and those

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<sup>76</sup> P Samuelson “Does Copyright Law Need to Be Reformed?” (2007) 50 *Communications of the ACM* 19 19.

<sup>77</sup> J Frank “Breakthrough trends in the Music Industry” (21-06-2012) Jay Frank <<http://www.futurehitdna.com/breakthrough-trends-in-the-music-industry>> (12-07-2014).

<sup>78</sup> Harrower (2005) *Contemporary Music Review* 483.

<sup>79</sup> Livingston & Urbinato (2013) *Vand J Ent & Tech. L.* 284.

tasked with the responsibility of determining if there is infringement or not. An answer in this regard may put an end to the subjective search for whether a substantial part has been taken or not. The problem is further exacerbated by the fact that there is no uniform consensus on what is meant by substantial part.<sup>80</sup> One commentator has referred to this substantial part test as a “nebulous area [which] is the heart of copyright law, and no doubt it is the most evasive part”.<sup>81</sup> The finding of a substantial part being reproduced has been described as a “subtle and complex” process.<sup>82</sup> This chapter will analyse all aspects of the substantial part test as applied by the courts, in order to better understand this test which has dominated so many copyright infringement cases.

#### 4 1 “any substantial part”

Section 1(2A) of the South African Copyright Act is where it all starts. This section gives life to the substantial part test as it says “[a]ny reference in this Act to the doing of any act in relation to any work shall . . . be construed as a reference also to the doing of any such act in relation to *any substantial part* of such work” (own emphasis).<sup>83</sup>

Section 1(2A) and section 16(3) of the UK Copyright Act are almost identically worded. Section 16(3) states that “[r]eferences in this part to the doing of an act restricted by the copyright in a work are to the doing of it – (a) in relation to the work as whole or *any substantial part* of it” (own emphasis). It is well-known that South African copyright law is heavily influenced by, and has borrowed extensively from, the UK copyright law.<sup>84</sup> South African copyright law is effectively modelled on the UK copyright law.<sup>85</sup> Therefore it comes as no surprise that section 1(2A) of the Copyright Act is modelled on the UK version. This means that it was the UK copyright law that first developed the notion of a ‘substantial part’. The words ‘any substantial part’ appeared for the first time in the 1911 UK Copyright Act.<sup>86</sup> There was no ‘substantial

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<sup>80</sup> A B Cohen “Masking Copyright Decisionmaking: The Meaningless of Substantial Similarity” (1987) 20 *U.C.Davis L.Rev.* 719 722; See M F Sitzer “Copyright Infringement Actions: The Proper Role for Audience Reactions in Determining Substantial Similarity” (1981) 54 *S.Cal.L.Rev.* 385 385.

<sup>81</sup> R F Flemming “Substantial Similarity: Where Plots Really Thicken” (1969) 19 (ASCAP) *Copyright L .Symp.* 252 262.

<sup>82</sup> *Baxter v. MCA, Inc.* 424.

<sup>83</sup> Section 1(2A) of Copyright Act.

<sup>84</sup> Klopper et al. *Intellectual Property in South Africa* 149.

<sup>85</sup> 149.

<sup>86</sup> *Hawkes and Son (London), Limited v Paramount Film Service, Limited* 605.

part' written in any legislation before that.<sup>87</sup> The term 'substantial part' derived out of English court decisions when judges would use those words, or other similar ones, to describe those situations in which copyright infringement would be found.<sup>88</sup> Before the 1911 Act the judges would use substantial part, and similar terms, to describe those parts taken from a copyrighted work which were unique to that work, or which made that work identifiable from others.<sup>89</sup> Substantial part was used to define that quality of a work which makes said work unique and original.

As stated above, the term 'substantial part' derived out of UK court decisions. As early as 1878, Lord Hatherley was reported saying that "if the quantity taken be neither substantial nor material ... [then] no wrong is done and no action can be brought".<sup>90</sup> This was said in the context of whether the defendant's copying of the plaintiff's work was fair use or not. This decision, along with others, has paved the way for the substantial part test, as it is known currently. The courts' persistent use of the term 'substantial part' allowed it to be legislated in the UK Copyright Act, therefore cementing its position as a copyright infringement test.

#### 4 1 1 *Quality versus quantity*

It is trite law that copyright looks at the quality of what was taken in an infringing work more so than the quantity of what was taken.<sup>91</sup> The oft quoted passage from the *Ladbroke* case,<sup>92</sup> which is quoted with approval in the well-known copyright infringement decision of *Galago Publishers v Erasmus*, regarding reproduction of a substantial part reads as follows:

"If he does copy, the question whether he has copied a substantial part depends much more on the quality than on the quantity of what he has taken. One test may be whether the part which he has taken is novel or striking, or is merely a common-place arrangement of ordinary words or well-known data. So it may sometimes be a convenient short cut to ask whether the part taken could by itself be the subject of copyright. But, in my view, that is only a short cut, and the more correct approach is first to determine whether the plaintiff's work as a whole is "original" and protected by copyright, and then to enquire whether the part taken by the defendant is substantial. A wrong result can easily be reached if one begins by dissecting the plaintiff's work and asking, could section A be the subject of

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<sup>87</sup> 605.

<sup>88</sup> 605.

<sup>89</sup> 606.

<sup>90</sup> *Frederick B. Chatterton and Benjamin Webster v Joseph Arnold Cave* (1878) 3 App. Cas. 483 492.

<sup>91</sup> *Dean Handbook of South African Copyright Law* 1-65.

<sup>92</sup> *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465 (HL).

copyright if it stood by itself, could section B be protected if it stood by itself, and so on. To my mind, it does not follow that because the fragments taken separately would not be copyright, therefore the whole cannot be. Indeed, it has often been recognised that if sufficient skill and judgment have been exercised in devising the arrangements of the whole work, that can be an important or even decisive element in deciding whether the work as a whole is protected by copyright.”<sup>93</sup>

This passage above will be used as a platform for discussion throughout this chapter, as it is particularly relevant to understanding the substantial part test. The very first sentence however sets the bar for all legal precedent. It unequivocally states that in determining if a substantial part was taken, it “depends much more on the *quality than on the quantity* of what he has taken” (own emphasis).<sup>94</sup> There can be no doubt that the courts favour quality over quantity, as many other cases have quoted this passage with approval.<sup>95</sup>

Dean states that the orientation towards a qualitative assessment is supported by the wording of the Copyright Act.<sup>96</sup> The use of the word ‘any’ in Section 1(2A) supports this notion of a qualitative assessment, as it allows the court to consider ‘any’ part taken, big or small. There is no differentiation between amounts. Of course the parts taken must have substance, namely, content that makes them original, and they cannot merely be *de minimis* parts.<sup>97</sup> Furthermore, section 12(3) suggests that the taking of a single quotation from a work can result in copyright infringement. This offers unique insight, as it suggests that the taking of a single quotation, which is arguably not quantitative in nature, due to the fact that it is only a single quotation, can still amount to copyright infringement.<sup>98</sup> Therefore section 12(3) read with section 1(2A) suggests to the readers that the Copyright Act is more supportive of a qualitative assessment.

Despite the general tendency leaning in favour of the qualitative assessment, this does not mean that the quantitative assessment is irrelevant. The courts will consider both assessments, but, should those parts which make a work unique and original be

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<sup>93</sup> 469.

<sup>94</sup> 469.

<sup>95</sup> *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Limited* [2006] JOL 17063 (SCA) para 45; *Biotech Laboratories (Pty) Ltd v Beecham Group PLC* 2002 4 SA 249 (SCA) para 9; *Jacana Education (Pty) Ltd v Frandsen Publishers (Pty) Ltd* 1998 2 SA 965 972G-J; See generally *SW Hart & Company Pty Ltd v Edwards Hot Water Systems* (1985) 159 CLR 466.

<sup>96</sup> Dean *Handbook of South African Copyright Law* 1-66.

<sup>97</sup> 1-66.

<sup>98</sup> 1-67.

taken, then a finding of copyright infringement, based on a qualitative assessment, will be found. In *Hawkes and Son*, the court *a quo* did not find that there was copyright infringement as only 20 seconds of a four minute song was reproduced.<sup>99</sup> Lord Eve, of the *a quo* decision, took a more quantitative assessment in determining if there was copyright infringement, and came to the finding above, namely that 20 seconds does not quantitatively amount to a substantial part taken. However, this decision was overturned by the court on appeal which reached the unanimous decision that 20 seconds did amount to a substantial part, as that part which was taken was qualitatively unique to the song, and was a part which people could identify the song by.<sup>100</sup> Lord Slesser acknowledged that the part reproduced was rather short, but that the part taken was an essential part, and satisfied the substantial part test.<sup>101</sup> It is interesting to note what difference can occur in a copyright infringement finding should a judge lean in favour of one assessment, such as a qualitative one, as opposed to the other. From a quantitative point of view 20 seconds is very little, and had the judges relied solely on this assessment it is unlikely that there would have been a finding of copyright infringement.

A qualitative assessment therefore gives more attention to those original features of a work which give it a unique character.<sup>102</sup> Whereas the quantitative assessment would seem to be a numbers game, in that it depends on how much was taken as opposed to what is actually taken. It is easy to understand why courts favour a qualitative assessment in copyright infringement, particularly in music infringement cases. This is because it is possible that a very small part, which may be quantitatively miniscule in comparison to the rest of the song, be taken, yet that part which was taken may have the original musical hook or riff that makes the song so easily identifiable. This again can be seen with the Queen and Vanilla Ice example, where a quantitatively small part was taken, yet qualitatively it contained enough original characteristics to make the listener aware of the two songs' similarities. The greater the amount of a song that is reproduced, which may also encapsulate that qualitative element of the song, means a greater chance of a finding of copyright infringement.<sup>103</sup> This is partly

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<sup>99</sup> *Hawkes and Son (London), Limited v Paramount Film Service, Limited* 598.

<sup>100</sup> 599.

<sup>101</sup> 606.

<sup>102</sup> *SW Hart & Company Pty Ltd v Edwards Hot Water Systems* 483.

<sup>103</sup> *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] FSR 11 125.

because those listening to the song will find it easier to hear similarities if the parts taken are longer in duration, but also because the chances of reproducing a substantial part of a song will increase when reproducing more portions of the senior work as a whole.<sup>104</sup>

In *Haupt v Brewers Marketing Intelligence*, only 63 lines of source code were copied out of several thousand lines, yet the court held that this amounted to a substantial reproduction thereof.<sup>105</sup> Quantitatively, this reproduction could not have amounted to more than 2%,<sup>106</sup> yet the court held that the parts copied were “clearly considered to be a valuable ingredient of the program”.<sup>107</sup> The court is clearly in favour of a qualitative approach.

It is well established at this point that the part taken, if quantitatively small, can still amount to infringement, if the part was an important or unique part of the work.<sup>108</sup> This begs the question, what is an important part of a work, or how does the court determine whether the part taken is original or not?

#### **4 1 1 1 Assessing the valuable portions in copyrighted works**

The substantial part test, as described thus far in this paper, may appear to be applied in a chain like process, but practically the tests and the determination of whether or not a substantial part has been reproduced or not is generally determined together. However, for the sake of better understanding the test it is beneficial to break the test up to see all the factors the courts may consider, despite the fact that they may not approach an infringement proceeding in such a meticulous manner. It is now clear that the courts generally favour a qualitative approach against a quantitative approach. A finding that a certain part of a work has originality and which has subsequently been

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<sup>104</sup> *Designers Guild v Russell Williams* 125; Christian (2004) *Vand. J. Ent. L. & Prac* 141; See also G Laroche “Striking Similarities: Towards a Quantitative Measure of Melodic Copyright Infringement” (2011) 25 *Intégral* 39 for an interesting discussion on the merits of a quantitative assessment using coded algorithms in a computer program to determine the similarity between musical works. The author recognizes that the program is imperfect and cannot surpass the qualitative tests used by the courts, but that it could be used as a weighty factor for courts in the near future.

<sup>105</sup> *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Limited* para 45.

<sup>106</sup> The court says only 63 lines of *several thousand lines* where copied, therefore the amount of lines in the code must have been at the very least 3000 or more, so if it is assumed that there were 3000 lines, it would amount to 2% being reproduced, but realistically speaking, the percentage would have been lower (anywhere between 1.5% to 0.4%) as it is possible that the source code could have up to at least 10 000 lines.

<sup>107</sup> *Haupt t/a Softcopy v Brewers Marketing Intelligence (Pty) Limited* para 45.

<sup>108</sup> L Bently & B Sherman *Intellectual Property Law* 3 ed (2009) 188.

appropriated, will result in a favourable outcome for the senior copyright owner in infringement proceedings. The question that remains is, how does a court determine if that part which has been reproduced is of a qualitative nature or not?

Case law has solidified the notion that when determining if a substantial part has been taken, it is important to look specifically at that portion of the senior work which is original.<sup>109</sup> The court will then compare the junior work against the senior work to determine if the junior work has reproduced that original part which is unique to the senior work.

A good point of departure for determining the originality of a work was discussed in *Hanfstaengl v W H Smith and Sons*,<sup>110</sup> where the court said in relation to reproduction, that it is “that which comes so near to the original as to suggest that original to the mind of every person seeing it”.<sup>111</sup> This is quite similar to the test used in South African trade mark infringement cases, namely, where one trade mark so nearly resembles another mark that it is likely to deceive or cause confusion.<sup>112</sup> In trade mark infringement, the ‘confusing similarity’ test is satisfied when an average and notional consumer is confused as to the source of a product’s origin.<sup>113</sup> If this was to be considered in music infringement cases, where a causal connection has already been established, it could mean that when a lay listener hears a song or a part of a song, and thinks of another song, then that could be indicative of copyright infringement as a substantial part has arguably been reproduced by the junior song. It is the part taken and subsequently identified by the listener, which has made the senior song original and recognizable. Again, in the Queen and Vanilla Ice example, listening to the Vanilla Ice song would certainly make a listener think of Queen’s song, as that part which was taken by Vanilla Ice was an original part which made the Queen song easy to identify by the listeners. Even though only a small part was appropriated, it was that part of

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<sup>109</sup> See *Ehrenberg Engineering (Pty) Ltd v Topka t/a Topring Manufacturing and Engineering* 40 JOC (T); *Jacana Education (Pty) Ltd v Frandsen Publishers (Pty) Ltd*; *Spectravest Inc v Aperknit Ltd* [1988] FSR 161; *British Leyland Motor Corp. v Armstrong Patents Co.* [1986] UKHL 7; *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 2 SA 1 (A); See Dean *Handbook of South African Copyright Law* 1-66.

<sup>110</sup> [1905] 1 Ch 519.

<sup>111</sup> *Hanfstaengl v W H Smith and Sons* 519; See also *West v. Francis*, 5 Barn. & Ald. 743 where the court stated in an almost identical way that a “copy is that which comes so near to the original as to give to every person seeing it the idea created by the original”.

<sup>112</sup> Section 34(1)(b) of the Trade Marks Act 194 of 1993.

<sup>113</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 (A) 640.

the song which made it original and stand out, and therefore a substantial part could be said to have been taken.

In *Elsmere Music, Inc., v. National Broadcasting Company, Inc.*,<sup>114</sup> the judge stated that when considering if a song has been infringed you must look at whether ‘the heart’ of the song has been copied.<sup>115</sup> The heart has come to mean those parts which are repeated throughout the song and which serve as the musical theme.<sup>116</sup> References to ‘the heart’ of a song are synonymous with that original character which makes the song unique. This case did however add value by suggesting that the heart or that element which makes the song unique can be defined as that element which is repeated throughout the song or which sets the musical theme. Although it is not submitted that a repeated part is always the original part of a song, in this case the court acknowledge that the repeated part, or the heart of the song, was a significant portion of the composition, and that the copying therefore was more than *de minimis*.<sup>117</sup> Musical theme in itself is also a vague concept, which perhaps can be better defined as the essence of a work, or that part of the song which sets the general feeling and tone of the song.<sup>118</sup> It can further be described as that part which the lay listener could easily recognize,<sup>119</sup> such as the hook of the song. This offers yet more guidance in determining what quality of a song makes it original. If the heart of the song can be identified, then it is possible to determine whether or not music infringement has occurred. Determining what the heart of the song is, is no easy task and is very much a subjective test, but the case does provide some added and much needed direction.

One of the problematic aspects about music infringement cases is that songs generally fall into a certain genre, and these genres each contain a rough set of musical rules for a song to be classified under that genre.<sup>120</sup> For example, funk, as a genre, may be described by the rhythmic, fast, muted strumming of the guitar, with the elaborative and busy bass lines, which often features a brass ensemble. Although this is not necessarily true for every funk song, most funk songs may contain some or all

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<sup>114</sup> 1980 482 F.Supp 741.

<sup>115</sup> 744.

<sup>116</sup> 744.

<sup>117</sup> 744.

<sup>118</sup> Christian (2004) *Vand. J. Ent. L. & Prac* 140.

<sup>119</sup> 140.

<sup>120</sup> Anonymous “genre” *Dictionary.com* <<http://dictionary.reference.com/browse/genre>> (06-12-2014).



of these elements. But just because two songs both have a brass ensemble, a busy bass line, and a rhythmic guitar is not necessarily a ground for music infringement. These overall differences in music genres are known as 'macro-similarities', and it would not be possible for copyright to protect these.<sup>121</sup> The songs require use of these almost clichéd elements of a genre to categorize the song and to set the overall feeling of the song. An author of a song has no right to claim copyright in those elements. Although the court may consider the use of these elements as factors in determining if there is infringement or not, those aspects by themselves, if reproduced, would rightly not result in any infringement.<sup>122</sup> The genre of a song is not that element of a song which makes it original. It is not the heart of a song. When a layman listens to a song, they will hear what genre it is, but that in itself will not identify the song to them. Although the genre may help identify the song, it is those other elements of the song, namely the hook or the melodic line which often constitutes the heart, and which allow the song to be identified.

In *Northern Music v. King*, the court took quite a progressive step in delineating that element of a song which constitutes the original portion, or 'the heart':<sup>123</sup>

"Technically analyzed, a musical composition is made up of rhythm, harmony and melody. Originality, if it exists, must be found in one of these. Rhythm is simply the tempo in which the composition is written. It is the background for the melody. There is only a limited amount of tempos; these appear to have been long since exhausted; originality of rhythm is a rarity, if not an impossibility. Harmony is the blending of tones; this is achieved according to rules which have been known for many years. Being in the public domain for so long neither rhythm nor harmony can in itself be the subject of copyright.

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 finger prints of the composition, and establish its identity."<sup>124</sup>

It is suggested that this view as expressed above is a fallacious oversimplification.<sup>125</sup> Although it is true that the melody in most cases is the heart of a song, as it is commonly that element of the song which is most easily recognisable, the statement in *Northern Music* suggests that a complete makeover of a song, without

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<sup>121</sup> Christian (2004) *Vand. J. Ent. L. & Prac* 142.

<sup>122</sup> 142.

<sup>123</sup> *Northern Music Corp. v. King Record Distributing Co.*, 1952 105 F.Supp. 393 400.

<sup>124</sup> 400.

<sup>125</sup> Keyt (1988) *CLR* 431.

changing the melody, would still result in music infringement.<sup>126</sup> This surely cannot be true in all cases, as the elements surrounding the substantial part of a given work must also be considered in deciding if there is infringement or not. Keyt rightly suggests that this decision fails to consider two other important factors: firstly that a song comprises of many more elements than just the rhythm, harmony and melody; secondly that it is the interaction of these elements that define the originality or the heart of a song.<sup>127</sup> When you change one of these elements, it is possible that the original part of the song changes as well.<sup>128</sup>

With regard to the first factor, it is argued that this focus on the primary three elements of a song is an out-dated view in that since 1950 there has been a shift in focus onto various other elements of a song. These include the use of imaginative and microtonal pitch varied rhythms and phrasings, bass lines, new effects introduced as a result of technological advancements and the timbre of the instrument.<sup>129</sup> These elements, as well as a range of others, all contribute to making a song, as a whole, unique.<sup>130</sup>

As for the second factor, a melody is only given meaning with reference to the other elements of a song, such as the harmony, chords, rhythm and so forth.<sup>131</sup> A melody stripped of its harmonic and rhythmic counterparts would not be as easily identifiable as it would with the presence of said elements. Therefore the placement of an identical melody with a different harmony and rhythm will in essence place the melody in a new musical context, and this context gives the melody a new meaning, or interpretation by the listeners.<sup>132</sup> In determining whether or not there is infringement, the focus should be on not only how much of the material is taken, but also how much of the original uniqueness, or the meaning of the song is carried across.<sup>133</sup> The meaning is determined by the context in which the melody is placed. Therefore, when determining if there is infringement one must consider if enough of those elements which attribute meaning to the melody are taken before a finding of infringement can take place.<sup>134</sup>

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<sup>126</sup> 431.

<sup>127</sup> 431-432.

<sup>128</sup> 432.

<sup>129</sup> 432-433.

<sup>130</sup> 433.

<sup>131</sup> 437.

<sup>132</sup> 437.

<sup>133</sup> 438.

<sup>134</sup> 438.

The court in *Laubscher v Vos* supports the notion that it is important to consider the work as a whole when deciding if there is copyright infringement.<sup>135</sup> In this case, the defendant acknowledged that he copied the plaintiff's work, therefore the causal connection was established.<sup>136</sup> However, the court said it was still necessary to determine if a substantial part had been taken, and whether or not there was objective similarity between the works.<sup>137</sup> Although the focus in the infringement proceedings was whether the plaintiff's picture of a sparrow had been reproduced, the court felt it necessary to partly give attention to "the attitude in which the bird is depicted *but largely upon* matters such as the composition of the picture as a whole and the setting in which the bird appears" (own emphasis).<sup>138</sup> The italicised words reveal that this court gave weighty consideration to the overall composition of the picture, ie, those elements surrounding that portion of the senior work which makes it original, namely, the sparrow. Therefore, if applied to a musical work it is contended that if Vanilla Ice, for example, were to change enough of the surrounding elements of the musical work (such as the instrument (timbre), tempo and the rhythm of the opening riff), whilst leaving the appropriated melody mostly unchanged, it is unlikely there would have been a finding of objective similarity between the two works. The chances of there being a finding of copyright infringement would have therefore been lessened.

There have been a plethora of cases where the courts have attempted to unpack this concept of originality or value within musical works, most notably in the US. Starting with the *Northern Music* case discussed above, the court described that much sought after value as being "that portion which is the *whole meritorious part* of the song" (own emphasis).<sup>139</sup> Following that, in the *Robertson v. Batten, Barton, Durstine & Osborn Inc.* case,<sup>140</sup> the court said that the copying of a part of a song on "which its popular appeal, and, hence, its commercial success, depends" is a clear case for copyright infringement.<sup>141</sup> This case seems to apply a more objective standard by viewing what the public deem as the 'popular' part of a song. However, deciding what the public may deem as objectively popular is no easy task to perform. It requires that

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<sup>135</sup> 3 JOC (W).

<sup>136</sup> 6-7.

<sup>137</sup> 7.

<sup>138</sup> 7.

<sup>139</sup> *Northern Music Corp. v. King Record Distributing Co* 397.

<sup>140</sup> 1956 146 F.Supp 795.

<sup>141</sup> *Robertson v. Batten, Barton, Durstine & Osborn Inc.* 798.

the judge be in tune with the ever changing public perceptions and tastes with regard to music. This judgment offers the most insight into determining what part of a song constitutes the valuable part, the part that if reproduced would qualitatively amount to a substantial part copied. It requires less focus on what the court deems as ‘the heart’ or the ‘meritorious part’ of a song, and focuses more on the public and what they regard as the popular part. The fact that the song has received ‘commercial success’ is a consequence of the song being popular, and it is this right the copyright holder wishes to protect, namely their financial interests in the work. It is both an objective and a subjective test. Objective in that the test is what the public objectively deem as popular, but subjective in that it may be necessary to understand why the public perceive said part as the more popular part.

In the *Bright Tunes Music Corp v. Harrisongs Music, Ltd* case,<sup>142</sup> a decision which generated a lot of interest due to the status of one of the parties, George Harrison, a former member of the pop group The Beatles, the court, in a footnote, provided yet another analogy for courts to consider when evaluating the value of a song. The footnote referred to that valuable part as being the “essential musical kernel” of the song.<sup>143</sup> There is no doubt that this must have the same interpretation as *Elsmere’s* ‘heart’ of a song. This does very little for those trying to interpret what the essential part of a song is, as these courts provide mere descriptive synonyms for what the value might mean, unlike the *Robertson* case above which provided a *quasi*-test that can be used by the court. Later in the judgment it was stated that George Harrison, as the producer of the allegedly infringing song, produced a song in a way that would sound pleasing to the prospective listeners.<sup>144</sup> Harrison was aware of the prior song, which his song infringes upon, and the fact that it had attained a level of commercial success. It was for this reason that he knew when producing his song that it would be well received and become popular amongst listeners.<sup>145</sup> This ties in with the *Robertson* decision, and upon application of the ‘popular appeal’ test as stated in *Robertson*, it is clear why the judge in *Bright Tunes* came to the finding he reached. That is that Harrison’s song copied the plaintiff’s song.<sup>146</sup> Although the court in *Bright Tunes* did

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<sup>142</sup> 1976 420 F.Supp. 177.

<sup>143</sup> 178.

<sup>144</sup> 180.

<sup>145</sup> 180.

<sup>146</sup> 181.

not consider the *Robertson* case, nor the ‘popular appeal’ test, the test, if applied, would have caused the court to reach the same conclusion that it did, with the benefit of requiring a less subjective approach on the judges behalf when determining if the ‘essential musical kernel’ of the plaintiff’s song was copied by Harrison. Harrison used the same parts in his song which were popular in the plaintiff’s song, as it was known, possibly on a subconscious level, that those elements which he intended to use would be well received by the public due to the success of the plaintiff’s song.<sup>147</sup> He therefore reproduced those parts of the plaintiff’s song which the song itself depended on to attain the level of success which it did. This is how the ‘popular appeal’ test would have been applied, and the reason why the court would have reached the same conclusion if it had applied it.

Other cases have supported the *Robertson* test by also identifying those essential parts of the song as being “the very part that makes [the plaintiff’s work] popular and valuable”,<sup>148</sup> Then of course there is the seminal judgment of *Arnstein v Porter*,<sup>149</sup> a case which has often been referred to in music infringement matters, in which the court stated the following:

“The plaintiff’s legally protected interest is not, as such, his reputation as a musician but his interest in the potential financial returns from his compositions which derive from the lay public’s approbation of his efforts. The question, therefore, is whether defendant took from plaintiff’s works so much of what is *pleasing to the ears of lay listeners*, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff” (own emphasis).<sup>150</sup>

This passage offers two useful insights with regard to music infringement cases. Firstly, it suggests that it is the author’s commercial interest which is protected in his work, and not his reputation. Secondly, the value or the ‘heart’ of the song lies in that part which is ‘pleasing to the ears of a lay listener’. This statement can be read with the above quoted test in the *Robertson* case. Both the *Arnstein* and the *Robertson* cases favour a more layman approach by focusing on those parts of a song which are popular, as a result of public tastes, and that it is those parts that copyright seeks to protect. These courts therefore regard the popular part of the song as being the qualitative part, and that if copied, would amount to a substantial part having being

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<sup>147</sup> 180.

<sup>148</sup> *John & Johns Printing Co. v. Paull-Pioneer Music Corp.*, 1937 102 F.2d 282 283.

<sup>149</sup> *Arnstein v Porter* 464.

<sup>150</sup> 473.

copied. Furthermore, both these cases give due attention to the author's commercial interests in the works themselves. Of course, these cases must be approached with caution. These cases merely provide a method to determine the original parts of a song, but for infringement proceedings the question must always remain whether a substantial part has been reproduced. The US approaches and the substantial part test are related to the extent that it is necessary to identify whether the original part of a song has been reproduced for there to be a finding that a substantial part has been reproduced. The US cases do exactly that, namely, offer guidance in finding those valuable parts of a song. In deciding if a substantial part has been reproduced, UK and South African courts look for the original contribution and effort made by the senior author.<sup>151</sup> If the authors original effort has been reproduced, then that will likely result in a finding of copyright infringement.<sup>152</sup> The test therefore focuses on the original contribution of the author, and not what the public regard as 'popular'. However, it has already been stated that the US authority must be referred to as guides and not as determinative tests. The popular part of a song is also likely to be the same original part that the author has exerted effort in creating. This is because when creating a song, it makes sense that the author expends original effort in creating a popular hook or portion of the song, as that is the part of the song which his success arguably depends upon.

*Arnstein* is good authority that when any financial damage is caused to the plaintiff as a result of copying his work, then the plaintiff has a strong cause of action against the infringer.<sup>153</sup> This can also be referred to as the demand test. That is, where the appropriation by the defendant of that part of the song which the public regard as 'popular' means that the junior work serves the same function as the senior work, and therefore causes a decrease in demand in the senior work.<sup>154</sup> This test however does little in delineating the valuable part of the song. It merely informs the court that there is a likely case for infringement as well as there being a strong likelihood that a substantial part has been reproduced. The court must still ultimately decide whether there is a causal connection, and then if a substantial part of the plaintiff's work has

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<sup>151</sup> *Designer Guild v Russell Williams* 131.

<sup>152</sup> 131.

<sup>153</sup> *Keyt* (1988) 76 *CLR* 441.

<sup>154</sup> J Sherman "Musical Copyright Infringement: The Requirements of Substantial Similarity" (1972) 22 (*ASCAP*) *Copyright L. Symp* 81 114.

indeed been reproduced. Of course, this paper is still debating the merits of the substantial part test, and in what scenarios the courts are likely to find that a substantial part has been reproduced. This may serve as a decisive factor for the courts, as was the case in *Arnstein*,<sup>155</sup> as it informs the courts almost immediately that the public's demand for a certain sound or aural experience is being met by the junior work, most likely due to the appropriation of the valuable portion of the senior work. It is still the court's duty to ascertain said valuable part in order to make a finding that a substantial part has been reproduced. The focus should be on whether the valuable part of a song has been reproduced, regardless of whether there is demonstrable proof of a decrease in demand in the plaintiff's work.<sup>156</sup> Copyright law protects more than the author's economic rights.

Moving past the demand test, one commentator, in his interpretation of the *Boosey v. Empire Music Co.* case,<sup>157</sup> stated that copyright law protects those portions of the song which are valuable, both from an artistic and commercial point of view.<sup>158</sup> The court in *Boosey* regarded those parts of the song which "[cause] the audiences to listen, applaud, and buy copies"<sup>159</sup> to be the parts which are valuable, and worth protecting.

There are many court decisions and academics that support the notion that the value of the song is found in those parts that are popular, as determined by the public. It is submitted that the findings of the courts and the academic contributions are correct, insofar as they support the notion that the qualitative part can be found in those parts which are deemed popular, and on which the author relies to further his commercial interests. Once the qualitative element of the song has been identified the test, for copyright infringement purposes, is whether that part, or a substantial part thereof, has been reproduced.

There is a final methodology worth discussing, which courts may use in determining if the part of the song reproduced is indeed a part of value. In the *Ladbroke* case cited above, Lord Reid stated that it "may sometimes be a convenient short cut to ask

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<sup>155</sup> *Arnstein v. Porter* 473; See also *Folsom v. Marsh* 1841 9 F. Cas. 342, 348 (No. 4901).

<sup>156</sup> Sherman (1972) (ASCAP) *Copyright L. Symp.* 123.

<sup>157</sup> 1915 224 F. 646.

<sup>158</sup> Sherman (1972) (ASCAP) *Copyright L. Symp.* 106.

<sup>159</sup> *Boosey v. Empire Music Co* 647.

whether the part taken could by itself be the subject of copyright".<sup>160</sup> Lord Reid warns against over use of this method as it may not always lead to accurate results.<sup>161</sup> The courts must not, according to Lord Reid, develop lazy habits, as they must always determine whether the work is indeed a work capable of being protected by copyright, and then determine if infringement has occurred by making use of the two step process.<sup>162</sup> Sherman also subscribes to the approach discussed by Lord Reid, although he does so without referring to the *Ladbroke* decision.<sup>163</sup> He states that the valuable portions of a song, as discussed above, can be regarded as 'the work'<sup>164</sup> for purposes of copyright law. He therefore delineates the work to be that portion of the song which is regarded as being the valuable or qualitative portion, even if such portion is quantifiably smaller in proportion to the whole song.<sup>165</sup> He takes a step further, and does not heed the warning offered by Lord Reid. Although Sherman does not specifically incite his readers to regard his interpretation of a work being the qualitative portion of a song as a test, unlike in the *Ladbroke* case, his interpretation does find support from *Ladbroke*. In this way, his interpretation may be viewed as a *quasi*-test. Caution must be exercised when applying this test, as a finding that a portion of a song, if tested in isolation, does not have copyright protection might negate a finding of infringement in favour of the plaintiff. It is submitted that it is a skewed way of determining infringement as this shortcut test essentially taints the principles established in copyright infringement. The copyright infringement tests require a court to adopt a certain process in determining if there is infringement, and this shortcut test obfuscates this process by causing the judge to unnecessarily meander from the procedurally correct tests.

Therefore, it is accepted that a small part of a song can contain sufficient qualities to make it a valuable part of the song, and that if is reproduced it would amount to a substantial part being reproduced. To demonstrate this point one only needs to consider Beethoven's fifth symphony, where the first four notes of the symphony are without a doubt the most well-known and valuable. If Beethoven's symphony was

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<sup>160</sup> *Ladbroke (Football) Ltd v William Hill (Football) Ltd* 469.

<sup>161</sup> 469.

<sup>162</sup> 469.

<sup>163</sup> Sherman (1972) (ASCAP) *Copyright L .Symp* 135.

<sup>164</sup> A work is generally the accepted terminology to refer to any class of goods which may be eligible for copyright protection. Contextually, one may accept that the 'works' referred to by Sherman are copyright protected works; See generally Dean *Handbook of South African Copyright Law* 1-6-1-7.

<sup>165</sup> Sherman (1972) (ASCAP) *Copyright L .Symp* 135.



hypothetically still protected by copyright law, the appropriation of the opening four notes would certainly amount to copyright infringement.

#### 4 2 Methodologies used to determine if a substantial part has been reproduced

There are different methods to determine what the qualitative part of the song may be for copyright infringement purposes. The courts do not generally have a standardised approach, but rather use a specific method that may be more appropriate given the merits of the case. There has been debate as to which approach is more useful, or provides more accurate results. This paper will consider the main methodologies used by the courts to ascertain the valuable portion of the song.

##### 4 2 1 *The lay listener test*

The *Arnstein* case provides sound logical reasoning when dealing with musical infringement cases, and it is for this reason that it is so heavily referred to in other music infringement cases. The tests and doctrinal principles outlined in this case have remained practically the same throughout music infringement cases.<sup>166</sup> *Arnstein* makes use of the lay listener test, or as they prefer to call it, the 'ordinary lay hearer' test,<sup>167</sup> which for the purposes of this paper mean the same thing. *Arnstein* is particularly important for discussion of the various tests, as it considered and applied both the expert analysis test and the lay listener test.<sup>168</sup> It relied on the expert analysis test to prove whether the works were strikingly similar, so that the court may prove access of the work, namely, that a causal connection was present.<sup>169</sup> Once said access had been established, the court then relied on the lay listener test to establish whether a substantial part of the song had been reproduced or not.<sup>170</sup> Judge Frank of the *Arnstein* case found that the jury was well suited, as a group of lay listeners, to determine whether or not there was reproduction of a substantial part, provided of course that none of them were tone deaf.<sup>171</sup> He went a step further by suggesting that judges should, where possible, rather rely on an advisory jury as opposed to relying on the judges own subjective opinions of the two songs in issue.<sup>172</sup> Many countries,

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<sup>166</sup> Livingston & Urbinato (2013) *Vand J Ent & Tech. L.* 260.

<sup>167</sup> *Arnstein v. Porter* 468.

<sup>168</sup> 468.

<sup>169</sup> Sherman (1972) (ASCAP) *Copyright L. Symp* 96.

<sup>170</sup> 96.

<sup>171</sup> *Arnstein v. Porter* 473.

<sup>172</sup> 473.

such as South Africa, do not have a jury system – therefore when reference is made to the use of a jury in the US case law, it is suggested that the judges of non-jury jurisdictions adopt a jury like mentality in their determination of whether or not there is infringement. This would entail the judge wearing the hat of a lay jurymen as opposed to an expert.

There have been many other influential judgments which have made use of the lay listener test.<sup>173</sup> Up until this point, the discussions regarding the determination of the valuable portion in musical works has taken place with the use of the lay listener test. It is a difficult task trying to ascertain those often small, yet valuable portions of the song, which *Elsmere* so poetically referred to as ‘the heart’. Yet it is the lay listener that gets to determine what the ‘heart’ of the song is.<sup>174</sup>

The lay listener test essentially requires the court, or jury, to compare the two disputed musical works, and to determine whether the junior work appropriates that original character of the senior work, therefore amounting to a reproduction of a substantial part of the complainant’s work. This test encompasses two important copyright infringement tests, namely a determination of the substantial part, and then whether or not there is objective similarity between the two works. The lay listener is therefore essentially tasked with two responsibilities, although this is not stated specifically in the US case law. The first responsibility is to identify the substantial part of the senior work. Once the substantial part is identified, the second responsibility is determining if there is similarity between the substantial part in the senior work and the allegedly appropriated part in the junior work. The US courts have not gone so far as to break this part of the test into two separate tests. However, it is implied that when the lay listener is determining if there is a similarity between the two works, they are also tasked with determining if a substantial part has been reproduced. The determination of whether or not a substantial part has been reproduced obviously requires the lay listener to firstly identify the substantial part of a musical work. There is no particular order in which this might occur. The lay listener might, for example,

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<sup>173</sup> See *Hirsch. v. Paramount Pictures, Inc.*, 1937 17 F. Supp. 816 818 where the court makes use of a test where the “resemblance [within the song is] noticeable to the average hearer; And in *Boosey v. Empire Music Co* 647 the court talks about the “uninformed and technically untutored public” in determining whether or not a substantial part has been appropriated; lastly in *Arnstein v. Broadcast Music, Inc.*, 1943 137 F.2d 410 412 the court states the reproduction of a substantial part must be “capable of apprehension by the music loving public”.

<sup>174</sup> Christian (2004) *Vand. J. Ent. L. & Prac* 140.

identify the original part of a song first, and then come to a finding that there is objective similarity. Or they might first compare the appropriated portions of the junior work with the senior work, and then come to a conclusion that said parts amount to a substantial part thereof. The objective similarity test and the identification of the substantial part test are therefore generally subsumed under the same test, and it is for this reason that this paper discusses the lay listener test as a test for the determination of a substantial part.

Returning to the role of the lay listener test in the court, the key point of the test is that the judge does not base his decision on any expert knowledge, but rather on the same level of knowledge which the public possess. The trick however, is to compare the compositional elements of the musical work, and not to focus on the actual sound recording.<sup>175</sup> This is quite often a challenge for laymen, specifically in distinguishing between the musical work, and the sound recording, and it is for this reason that other courts have made use of expert witnesses.<sup>176</sup> *Arnstein* specifically excluded the use of expert analysis in the substantial part test, by saying it was a test best used by those “who comprise the audience for whom such popular music [is] composed”.<sup>177</sup> The court went further by saying “[t]he impression made on the refined ears of musical experts or their views as to the musical excellence of plaintiff’s or defendant’s works are utterly immaterial on the issue of misappropriation”.<sup>178</sup> There is no doubt that the *Arnstein* case is the front-runner in terms of its strict adherence to the layman test, and also the reason why courts today, especially in the US, are still applying the lay listeners test.<sup>179</sup>

The lay listener test is of course not without its critics. Judge Clark, in a dissenting judgment in *Arnstein*, said the reliance on the lay listener test is anti-intellectual, and contrary to established doctrinal precedent preceding *Arnstein*.<sup>180</sup> Professor Nimmer, much like Judge Clark, does not like the lay listener test as he feels it is inadequate to protect ‘the fruits’ of the copyright author from the public’s ‘spontaneous and

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<sup>175</sup> J Lund “An Empirical Examination of the Lay Listener Test in Music Composition Copyright Infringement” (2011) 11 *Va. Sports & Ent. L.J.* 137 149.

<sup>176</sup> 149.

<sup>177</sup> *Arnstein v. Porter* 473.

<sup>178</sup> 473.

<sup>179</sup> Lund (2011) *Va. Sports & Ent. L.J.* 139 (footnote 4); See the more recent case of *Positive Black Talk Inc., v. Cash Money Records, Inc.*, 2004 394 F.3d 357 373 which applied the lay listener test.

<sup>180</sup> 478.

immediate' impression that said fruits have been appropriated or not.<sup>181</sup> Others are of the view that the lay listeners test should be abandoned due to wrong results easily being reached because of reliance on the decision making skills of the untrained public.<sup>182</sup> Lund believes that the lay listener test is being applied incorrectly, as it should only be applied to those cases where the public must ascertain whether the musical compositions are substantially similar and not whether the sound recordings sound the same.<sup>183</sup> The issue stems from the fact that the public is untrained, and therefore, when viewing the sheet music, which is the evidence best used to ascertain the similarities between musical compositions, the public is unable to read the music, and therefore has an uninformed opinion.<sup>184</sup> Sound recordings were then introduced into the court room to overcome this problem. However, this meant that the lay listener was focusing on different aspects of the song, such as the performance, and not the composition per se, and therefore an incorrect result could be attained.<sup>185</sup> This performance aspect, which the public tends to focus on, includes the other elements of a song, such as the tempo, key, phrasing, genre, style and timbre of a song.<sup>186</sup> There is no doubt that these elements are important, but it distracts the lay listener from what is really important, namely the melody, rhythm and harmony. The court in *Bridgeport Music, Inc. v. Dimensions Films* rejected the lay listener test on the grounds that "[t]he analysis that is appropriate for determining infringement of a musical composition copyright, is not the analysis that is to be applied to determine infringement of a sound recording".<sup>187</sup> Lund set up an experiment with 178 participants to determine whether the lay listener test was a viable test, and his findings concluded that the participants focused too much on the performance of the songs as opposed to the musical composition.<sup>188</sup> This poses a problem, as the performance of a song rarely receives copyright protection, whereas the composition does.<sup>189</sup> Some of the participants also struggled to understand fundamental copyright law terminology, which is required to make an accurate finding.<sup>190</sup> This highlights the fact that a jury of

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<sup>181</sup> M B Nimmer *Nimmer on Copyright* (1970) §143.52.

<sup>182</sup> Lund (2011) *Va. Sports & Ent. L.J* 140.

<sup>183</sup> 147.

<sup>184</sup> 148.

<sup>185</sup> 148-149.

<sup>186</sup> 145.

<sup>187</sup> 2005 410 F.3d 792 798.

<sup>188</sup> 175.

<sup>189</sup> 175.

<sup>190</sup> 172-173.

lay listeners could easily reach a wrong result due to them not understanding which aspect of the song to compare, or not being able to appreciate the difference between a qualitative and quantitative assessment with regard to the substantial part test. The tendency of the lay listener to focus on the other features of a song distracts them from the crucial finding, namely, whether a substantial part has been taken. It is possible that the lay listener will incorrectly identify the substantial part of a song, or that they will not be able to distinguish between the substantial parts and the non-substantial parts. Expert witnesses may prove more useful in this regard, as they are trained at looking past the non-material elements of a song and identifying those features which are original. The study by Lund indicates that the lay listener test is susceptible to erroneous interpretation by the lay listeners, and that this test should therefore be approached with caution.

Another possible shortfall of the lay listener test is that the audience must be of the same level of sophistication as the music they are comparing.<sup>191</sup> It would be near impossible for lay listeners to detect a substantial part being reproduced in classical music, as this would require experts who understand the construction behind classical arrangements to determine whether or not there is possible infringement.<sup>192</sup> It has been suggested that lay listeners used in the courts may be the wrong persons to determine the infringement of a song, as they may not be the persons for whom the song is intended.<sup>193</sup> The consequence of such is an inability to appreciate appropriation between songs.

#### **4 2 1 1 The audience test**

This shortfall of the lay listener test, namely the inability of lay listeners to effectively compare certain musical works due to an unsophisticated ear, was addressed. A new test was suggested for the courts to use in order to overcome this shortfall.<sup>194</sup> The audience test restricts the jury, or any persons responsible for determining whether a substantial part has been reproduced, to that section of the public which the musical works are meant for – otherwise known as the target market, or ‘the audience’.<sup>195</sup> The

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<sup>191</sup> Sherman (1972) (ASCAP) *Copyright L .Symp* 95.

<sup>192</sup> 95.

<sup>193</sup> Comment “Copyright Fair Use – Case Law and Legislation” (1969) 73 *Duke L.J.* 73 84.

<sup>194</sup> Sitzer (1981) *S.Cal.L.Rev.* 385.

<sup>195</sup> 386.

courts have for the most part used the lay listener and the audience test somewhat interchangeably, and it is suggested that the audience test be viewed as a distinct test from the lay listener test.<sup>196</sup> It was once again the *Arnstein* case which paved the way for the audience test. The court noted that in determining whether there is substantial similarity between the works, one must determine “whether defendant took from plaintiff’s work so much of what is pleasing to the ears of the lay listeners, who comprise the *audience for whom such popular music is composed*” (own emphasis).<sup>197</sup> The audience test finds similarities with the demand test discussed above. Both tests presuppose that a junior infringing work can act as a substitute to the senior work, therefore not only appropriating the music itself, but the market as well.<sup>198</sup> The audience test therefore seeks to further protect the author’s economic incentive in creating new works.<sup>199</sup>

The justification for the audience test is that it is the target audience, or the market for whom the copyright owner composes their music, that will best be able to identify any comparable differences between two works. This is because the audience professes slightly more ‘expert’ knowledge on the music, without being experts per se. *Soptra Fabrics Corp. v. Stafford Knitting Mills, Inc.*,<sup>200</sup> is a good example of a case where the outcome differed significantly due to the application of firstly the lay observer test, and then at a later stage, an audience test.<sup>201</sup> Initially the *Soptra* court applied the lay observer test which led to a finding of non-infringement, but on appeal the court applied an audience test and reversed the finding on the ground that the average lay observer in the audience test “scrutin[ized]” the work.<sup>202</sup> It is therefore suggested that the outcome in a music infringement case can differ significantly depending on which test is applied by the courts.<sup>203</sup>

On one extreme of the spectrum of tests determining the reproduction of a substantial part, there is the lay listener test. Somewhere along the middle lies the

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<sup>196</sup> 386-387.

<sup>197</sup> *Arnstein v. Porter* 473.

<sup>198</sup> Sitzer (1981) *S.Cal.L.Rev.* 395.

<sup>199</sup> 416.

<sup>200</sup> 1973 365 F.Supp. 1199.

<sup>201</sup> Sitzer (1981) *S.Cal.L.Rev.* 402.

<sup>202</sup> 1974 490 F.2d 1092 1093; See also Sitzer (1981) *S.Cal.L.Rev.* 401 where it was noted that despite the appeal court referring to the test as the average lay observer test, the judge was actually applying a test more akin to the audience test.

<sup>203</sup> Sitzer (1981) *S.Cal.L.Rev.* 404.

audience test and on the other extreme is the expert analysis. The lay listener test and the audience test are not tests in the true sense of the word, but should rather be viewed as guiding principles. The test is whether there is objective similarity between a substantial part of the senior work and the appropriated part in the junior work.<sup>204</sup> This test applies to all works irrespective of the type of work. The lay listener test and audience test however are useful in that they offer another means of identifying substantial similarity between two musical works. The tests therefore offer guidance to the courts with specific reference to musical works, and these tests must be appreciated for what they are, namely, guidelines to determining substantial similarity. It is submitted that these approaches should not be elevated to tests in themselves. They should rather be used in conjunction with the copyright infringement tests and not supplant them. There is room within the framework of copyright infringement tests to incorporate the US approaches to better identify the substantial part and substantial similarity in two competing musical works. Of course, the use of expert witnesses may resolve the problems posed by the lay listener test, and it is therefore appropriate that this paper give due attention to the highly debated use of expert witnesses in musical infringement proceedings.

#### 4 2 2 *Expert witnesses*

“I have played the tape which contains the two musical compositions and although I do not know the difference between be-bop, hip-hop, and rock and roll, the tunes all sound the same to me. This may be because I have no ear for music other than reflecting my generation's preference for the more soothing rhythms of Glen Miller and Wayne King or the sophisticated beat of Woody Herman playing the Wood Chopper's Ball. Obviously judges have no expertise to resolve this kind of question...”<sup>205</sup>

The above passage serves as a good synopsis of how subjective judges and jurors can be in music infringement cases, and that it may be necessary to have more trained ears when making comparisons. Expert witnesses have generally become more widely used in music infringement cases, given the technical nature of musical compositions and the difficult theory which is seldom known to the judge or layman.<sup>206</sup> There have been many cases where the judges, as laymen, have made incorrect

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<sup>204</sup> *Francis Day & Hunter Ltd. v Bron* 623.

<sup>205</sup> *Moore v. Columbia Pictures Indus., Inc.*, 1992 972 F.2d 929 948.

<sup>206</sup> Livingston & Urbinato (2013) *Vand J Ent & Tech. L.* 239; Sherman (1972) (ASCAP) *Copyright L. Symp* 93.

decisions based on their faulty understanding of music terminology and concepts.<sup>207</sup> It is for this specific reason that the use of expert witnesses in music infringement cases is increasing. They provide the judge with complete and informed understanding of the issues, so the judge may not fall into the trap of relying solely on their own understanding which is lacking.<sup>208</sup> Recent cases have appreciated the value that expert witnesses offer in music infringement cases, stating that it “may be necessary to resolve claims of copyright infringement”,<sup>209</sup> as well as allowing “unfamiliarity of the court with the genre [to be] overcome”.<sup>210</sup>

Naturally, there are those that are against the use of expert witnesses,<sup>211</sup> a leading reason being that two opposing expert analyses, which both provide informed reasoning why there is or is not infringement, ultimately cancel each other out.<sup>212</sup> Others view expert analysis as being too technical, and that the approach is too strict.<sup>213</sup> Their analytical process has been regarded as too wide in that it covers an unrealistically large amount of potentially infringing elements within a song, which when compared by a lay listener, would not be deemed infringing at all.<sup>214</sup>

It is argued that experts can provide more accurate results in deciding if a substantial part of a song has been reproduced when compared to laymen.<sup>215</sup> This is due to their professional training as musicologists. Experts will not be as susceptible to comparing the performance aspects of a song, as discussed above, than a layman will.<sup>216</sup> A methodology of an expert witnesses is to compare all aspects of the song including the melody, harmony, style, rhythm, tonality, tempo, key and lyrics, and then to compare these finding with prior musical sources.<sup>217</sup> The point of comparing to prior musical sources is to determine the originality of each song.<sup>218</sup> This is a common

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<sup>207</sup> 271 (footnote 311).

<sup>208</sup> 275. The author suggests that incorrect decisions are reached by judges as a result of (1) lack of understanding with music theory, (2) unhelpful contributions of experts, (3) lack of understanding of Western tonality and (4) an inability to distinguish between copying of plaintiffs work, and reliance on material that is available in public domain.

<sup>209</sup> *Velez v. Sony Discos* No. 05 Civ. 0615 (PKC) 2007 WL 120686 5.

<sup>210</sup> *Tisi v. Patrick* 541.

<sup>211</sup> See *Overman v. Loesser* 1953 205 F.2d 521 524; *Walters v. Shari Music Pub. Corp.* 1960 185 F. Supp. 408 409-10; *Supreme Records, Inc. v. Decca Records, Inc.*, 1950 90 F. Supp. 904 912.

<sup>212</sup> Livingston & Urbinato (2013) *Vand J Ent & Tech. L.* 273.

<sup>213</sup> Sitzer (1981) *S.Cal.L.Rev.* 403.

<sup>214</sup> 403.

<sup>215</sup> Livingston & Urbinato (2013) *Vand J Ent & Tech. L.* 274.

<sup>216</sup> 274.

<sup>217</sup> E M Harrington “Can I get a (Defense Expert) Witness? The Role of the Expert Witness for the Defense in a Music Copyright infringement Matter” (2011) 11 *MEIEA J.* 83 88.

<sup>218</sup> 88.



practice for the defence's expert witness in order to prove that the substantial part of the plaintiff's song was not reproduced.

Returning once again to *Arnstein*, this court drew a distinction between when expert analysis must be relied upon, and when the lay listeners test must be used.<sup>219</sup> The court in *Arnstein* developed a two-step process on dealing with music infringement cases. Firstly, the plaintiff must prove a causal relationship between the works; however, this can also be achieved by showing striking similarities between the works.<sup>220</sup> To prove that the works are strikingly similar is a technical and complicated issue, as it requires a discussion of various factors, such as independent creation, theory of coincidence and consideration of prior art.<sup>221</sup> It is for this reason, as suggested by *Arnstein*, that the experts are best equipped to deal with this issue. But the *Arnstein* case limited the use of experts purely to the strikingly similar test. For the substantial part test, the court favoured the lay listener approach and specifically excludes the use of expert witnesses in this part of the test.<sup>222</sup>

The *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*<sup>223</sup> case took on a very similar approach to *Arnstein*. The court divided its copyright infringement process into two steps, much like *Arnstein*. The court developed an 'extrinsic test' to determine if there was substantial similarity in an idea. For this, the court conceded that it would need to rely on the evidence of an expert in reaching a decision.<sup>224</sup> The second leg of the test, the 'intrinsic test', focussed on whether there was substantial similarity in the expression of the work. For this the court said the outcome "depend[s] on the response of the ordinary reasonable person" and that "expert testimony [is] not appropriate".<sup>225</sup> Although this case dealt with a separate issue to the *Arnstein* case, this court made reference to *Arnstein*, and acknowledged that both courts apply the same type of test in its infringement proceedings.<sup>226</sup> It is noteworthy that these cases appreciate the need for expert witnesses, and that a court case should not subscribe to either an entirely lay listener approach, or an expert witness approach. There is no doubt that there is an inherent conflict between the

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<sup>219</sup> *Arnstein v. Porter* 468.

<sup>220</sup> 469.

<sup>221</sup> *Sherman (1972) (ASCAP) Copyright L. Symp* 96.

<sup>222</sup> *Arnstein v. Porter* 468.

<sup>223</sup> 1977 562 F.2d 1157.

<sup>224</sup> *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp* 1164.

<sup>225</sup> 1164.

<sup>226</sup> 1164.

application of both these tests,<sup>227</sup> but both these courts attempt, and succeed, in reconciling these tests so that both have equal weight. The *Baxter* case applied the bifurcated *Krofft* test in its own decision, and held the same position as *Krofft*, namely that the 'intrinsic test' depends upon the response of the ordinary reasonable person.<sup>228</sup> The intrinsic test was applied in determining whether the musical compositions were substantially similar.

As already discussed,<sup>229</sup> one of the biggest challenges facing the lay listener test is that the lay listener is not always skilled enough to filter the original parts of a song from the non-original parts. This inability can lead to incorrect findings as the lay listener is not able to satisfy even the most basic of copyright infringement principles, namely, the determination of whether a substantial part has been taken or not. Furthermore, composers who do in fact appropriate substantial parts of senior works into their own works often try to "camouflage" such appropriation by changing other elements of their song,<sup>230</sup> such as the rhythm and harmony. In so doing, they deceive the very class of listeners who are responsible for determining if there is substantial similarity.<sup>231</sup> But it has been rightly suggested that the use of experts in this regard will lessen the likelihood of there being an incorrect finding of the substantial part.<sup>232</sup> In the dissenting judgment of the *Arnstein* case Judge Clark vehemently disagrees with Judge Frank on crucial points. He rejects the two-step approach adopted by Judge Frank and states that the abilities of the lay listeners displays ignorance and a lack of vision when coming to a finding on such important aspects of copyright infringement proceedings.<sup>233</sup> He is of the opinion that the bifurcated test should be a single test "to be made intelligently".<sup>234</sup> It is clear that Judge Clark favours the use of expert testimony, and is strongly opposed to the lay listener test. Unfortunately for Judge Clark, his decision carries little weight as it is the judgment of Judge Frank which is being followed by the majority of cases which deal with similar infringement proceedings. However, Judge Clark is not the only person who disagrees with the

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<sup>227</sup> Sherman (1972) (ASCAP) *Copyright L. Symp* 96.

<sup>228</sup> *Baxter v. MCA Inc.* 424.

<sup>229</sup> Part 4 2 3 above.

<sup>230</sup> P W Orth "The Use of Expert Witnesses in Musical Infringement Cases" (1955) 16 *U.Pitt.L.Rev.* 232 254.

<sup>231</sup> 236.

<sup>232</sup> 236-237.

<sup>233</sup> *Arnstein v. Porter* 476.

<sup>234</sup> 476.

approach followed in the *Arnstein* case. Some authors have noted that the *Arnstein* case “is a step backward”.<sup>235</sup> Orth contends that Judge Frank of the *Arnstein* case placed too much emphasis on the lay listener test, and that the strict separation of the tests might lead to inaccurate results in the lay listener stage.<sup>236</sup> He is of the opinion that the cases preceding *Arnstein* were dealt with in the correct manner, namely, decided by the judge and not the jury. Orth believes the judge is the appropriate person to decide on matters of music infringement, supposedly because of their in-depth knowledge of copyright principles.<sup>237</sup>

The use of expert witnesses in courts has generally been embraced. Although there is no concrete answer as to which approach – the lay listener or expert witnesses - is better, the value that expert analysis offers cannot be underappreciated. It is of course a preliminary issue for the courts to decide if they wish to accept expert evidence or not. The following paragraph from Livingston & Urbinato’s article correctly summarizes the position with regard to experts in the court:

“[E]xperts occupy an essential role in music infringement cases because of the general inaccessibility of music structure and theory to the average lay person. Even without the assistance of expert testimony, most ordinary individuals have a healthy capacity to discern whether two photographs, paintings, plays, and novels are similar, to the extent that the later work is likely to have been copied from the earlier work (assuming that the plaintiff has demonstrated evidence of access). In other words, regardless of what various hired experts may say, the average person knows what he or she sees and reads. But in music cases, does the jury really know what it is hearing? Works that are musically unlike can sound similar, and works that are musically alike can sound different, depending on the performer’s presentation and the listener’s musical sophistication. As a result, the musical expert’s views carry special weight - the expert tells the lay listeners what exactly they are hearing.”<sup>238</sup>

#### **4 2 2 1 Expert assisted audience test**

Orth, who is against the use of the *Arnstein* lay listener test, suggests a test which finds a compromise between expert witnesses and the lay listener test. He states that “expert testimony would be used to guide the jury, to point out significant similarities and possibly to explain and clarify psychological reactions to the two compositions”.<sup>239</sup>

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<sup>235</sup> Orth (1955) *U.Pitt.L.Rev.* 250.

<sup>236</sup> 250.

<sup>237</sup> 250.

<sup>238</sup> Livingston & Urbinato (2013) *Vand J Ent & Tech. L.* 284-285.

<sup>239</sup> Orth (1955) *U.Pitt.L.Rev.* 255.

He believes it is valuable to have expert testimony for both the plaintiff and defendant, as it is extremely beneficial to have the experts agree on some of the same points, even if it means they give contradictory and counteractive evidence on other points.<sup>240</sup> In terms of finding substantial similarity, he suggests that the experts instruct the lay listener on what aspects of the musical work they should find similarities in.<sup>241</sup>

Lay listeners will face difficulties in identifying the substantial part of the song due to the fact that the defendant has often “put in enough camouflage so that the ordinary listener cannot detect his base”.<sup>242</sup> The lay listener will therefore not hear similarities or identify any substantial parts thereof, whereas an expert will be able to.<sup>243</sup> Like Sitzer, Orth favours an audience test, particularly with popular music, as he is of the opinion that music infringement cases should be determined by those for whom the music is composed.<sup>244</sup> Resources should not be spent on expert testimony for uncomplicated music, such as pop songs, when the audience themselves will not be able to hear or appreciate any similarities in two competing works.<sup>245</sup> Therefore Orth suggests, with particular reference to popular music, that the test should remain an audience test, but with expert assistance. Although Orth makes some salient suggestions, his viewpoint that experts are not needed for popular music is not entirely accepted by this paper. His reason for suggesting as such is well rationalised, but it obfuscates music copyright infringement proceedings in that the court will have to decide on another issue. That is, whether or not the music itself warrants expert testimony based on how ‘popular’ or ‘complicated’ the music may be. It adds yet another inquiry into the court process, and prolongs the outcome. Therefore, inasmuch as he suggests experts are not necessary in popular music, this paper does not accept this viewpoint. His suggestion that experts be used to guide the lay listener is well founded, and courts in general would be at an advantage to make use of this approach in determining the reproduction of a substantial part.

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<sup>240</sup> 255.

<sup>241</sup> 256.

<sup>242</sup> 254.

<sup>243</sup> 254.

<sup>244</sup> 253.

<sup>245</sup> 253-254.

### 4 2 3 *Prior art*

The reliance on prior art is a process more commonly used by the expert witnesses, especially for the defence, to prove that the senior work lacks that original quality that the plaintiff alleges has been reproduced.<sup>246</sup> Proving this is of course important for the defence, as it would mean that the plaintiff's song is using common elements available to the defendant as well, for the purposes of composing a song.<sup>247</sup> It could therefore negate a copyright infringement claim. Prior art is perhaps more accurately referred to as "prior musical source" by the experts,<sup>248</sup> although the use of the phrase 'prior art' has been used more often in music infringement cases. Although it is a process more commonly used by expert witnesses, there is nothing barring the judges, or any party, from presenting evidence which might reveal prior art, and therefore potentially negating a claim for infringement. The purpose of relying on prior art is to find that original quality in the senior work in other works that preceded the senior work.<sup>249</sup> Therefore, if there is 'prior art' or art which existed prior to the senior work, then the senior work may possibly not be able to house an infringement claim against the infringing junior work. *Johnson v. Gordon* is an example of a case where the court considered the prior art. The court found that the originality in the chord progression of the plaintiff's work could be "found in thousands of songs" preceding the plaintiff's work.<sup>250</sup> There was therefore no finding of infringement.<sup>251</sup> The existence of prior art is not necessarily always enough to negate copyright infringement. It is entirely possible for a plaintiff to rely on prior art yet still produce an original work capable of receiving copyright protection. In those circumstances where the plaintiff receives copyright protection in their work which features prior art, the court will then determine to what degree the defendant has reproduced the original parts of the plaintiff's work. Prior art may be used by all persons. The fact that a plaintiff relies on prior art to create a work does not bar a defendant from relying on the same prior art in creating his own work.<sup>252</sup> Although the defendant may use the same prior art as the plaintiff in creating his own work, the defendant may not use the original portions of the plaintiff's work in

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<sup>246</sup> Harrington (2011) *MEIEA J.* 88.

<sup>247</sup> 89.

<sup>248</sup> 88.

<sup>249</sup> Dean *Handbook of South African Copyright Law* 1-66.

<sup>250</sup> 2005 409 F.3d 12 23.

<sup>251</sup> 23.

<sup>252</sup> *Harman Pictures NV v Osborne* 1967 1 WLR 723 732.

creating his own work.<sup>253</sup> The defendant must expend his own labour and not rely on the effort expended by the plaintiff in creating a work, or else this will fall squarely within a copyright infringement claim.<sup>254</sup>

#### 4 3 Alternative defences

##### 4 3 1 *Fair dealing*

Up until this point, this paper has focused primarily on US music law, due to the fact that other jurisdictions, such as South Africa, do not have as much girth when dealing in music law as the main jurisdictions focused upon in this paper. The US differs again quite significantly in its fair dealing, or fair use, exceptions when compared to South Africa or the UK. This is due to the fact that they do not have a closed list of fair dealing exceptions.<sup>255</sup>

South Africa and UK copyright legislation has a closed list on these fair dealing exceptions.<sup>256</sup> These exceptions allow for an encroachment on the authors exclusive rights in their work, where the junior work is used for research, private study, criticism, review or on reporting current events. Section 107 of the US Copyright Act has four open ended factors which must be determined by the court before they can conclude that such infringement was fair use. These factors are: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the original work, and the potential impact such use may have upon the market.<sup>257</sup> The last factor coincides with the demand test discussed above,<sup>258</sup> and there has been some confusion as to whether or not this factor is used in determining fair use, or in determining whether a substantial part has been reproduced.<sup>259</sup> Due to the inherent overlap in the demand test, the approach thus far has been to apply the same test for both aspects, namely substantial similarity, and fair use.<sup>260</sup> Despite the difference between the fair dealing exceptions in the different

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<sup>253</sup> *Hogg v Scott* 1874 L.R. 18 Eq. 444 458.

<sup>254</sup> *Harman Pictures NV v Osborne* 732.

<sup>255</sup> See Dean *Handbook of South African Copyright Law* 1-93 where the author submits that the US use of the 'fair use' term compared to the South African and UK use of 'fair dealing' are synonymous.

<sup>256</sup> Section 12 of the Copyright Act 98 of 1979 (South Africa) and Sections 29-31 of the Copyright, Designs and Patents Act 1988 (UK).

<sup>257</sup> Section 107 of the United States Copyright Act of 1976.

<sup>258</sup> See above 25-26.

<sup>259</sup> Sherman (1972) (ASCAP) *Copyright L .Symp* 115.

<sup>260</sup> 118.

jurisdictions, it has been contended that the US fair use factors be considered in South African courts when determining if such use falls under the fair dealing exception.<sup>261</sup>

If the author of the junior work can therefore prove that their work is covered under the fair dealing exceptions, they will not be held liable for infringement. The junior author will however find more difficulty in proving such fair dealing for musical works due to the nature of the work, which is mainly for entertainment purposes.<sup>262</sup> Fair dealing will generally not permit an invasion on the senior author's exclusive rights where it will impact his economic interest.<sup>263</sup> It will be very difficult for the junior author to satisfy the courts that their use of a substantial part of the senior work was not to make any kind of financial gain. Works meant for entertainment, such as music, are often produced with the purpose of making a financial gain, so the junior author will have to be very persuasive should they wish to convince the court that they never had an economic intention in mind when reproducing the senior work. But in any case, the demand test will operate against the junior author where their work appropriates the market of the senior work. The junior author will have to prove that either their work did not cause any diminution in the senior author's market or revenue, or that such diminution would have occurred regardless of the existence of the junior work.<sup>264</sup>

Nonetheless, provided the junior author can pass all these hurdles and satisfy the courts that such use falls under the fair dealing exception, the court will exempt any potential infringement made by the junior work, and will allow such work to remain intact.

#### 4 3 2 *De minimis*

In practice, where the junior author reproduces such a small amount of work that the average listener would find difficulty in noticing any reproduction, then the court will not find the junior work to be infringing, even if causality is well established.<sup>265</sup> This is due to the *de minimis* defence which allows a copyrighted work to be reproduced provided the part reproduced is so small, it falls below the threshold of being a substantial part. This defence is based on exactly the opposite of what this paper

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<sup>261</sup> Dean *Handbook of South African Copyright Law* 1-93-1-94.

<sup>262</sup> Sirois & Martin (2007) *Info. & Comm. Tech. L* 10.

<sup>263</sup> Dean *Handbook of South African Copyright Law* 1-93; S C Hampel "Are samples getting a bum rap? Copyright infringement or technological creativity?" (1992) *U.Ill.L.Rev.* 559 564.

<sup>264</sup> Hampel (1992) *U.Ill.L.Rev.* 564.

<sup>265</sup> Sirois & Martin (2007) *Info. & Comm. Tech. L* 11.

discusses. This paper is concerned with discussing the substantial part test and under which circumstances the courts will find a substantial part has been reproduced, yet the *de minimus* test requires that the part reproduced be below the threshold of the substantial test, or else the junior author will fail in relying on this defence. This is a defence most often relied on in music sampling, but it is equally important in music infringement cases. In deciding if the *de minimis* defence is applicable, courts will once again give attention to the quality verses quantity debate, and decide if that portion so taken was either qualitatively too insignificant or quantitatively too little.<sup>266</sup> Much like the tests for determining substantial similarity, the *de minimis* defence also makes use of the lay listener test.<sup>267</sup> If lay listeners can identify such reproduction, then it is obviously not *de minimis*. However, if they cannot then it may be *de minimis*. It may however be futile applying this test, as the lay listener test is used for both processes, namely in determining if a substantial part has been reproduced, or whether *de minimis* reproduction has occurred. A finding for either test or defence will directly impact the outcome of the other. Nonetheless, it is a defence that is readily available for the defendant should he wish to use it.

#### 4 3 3 Scènes à faire

The *scènes à faire* defence informs the court that the portion or elements reproduced from the senior work are so common, or that they, for example, form part of a given genre, that there cannot be any originality or value in the senior work, and that there is therefore no reproduction of the song.<sup>268</sup> The argument is that the senior work has merely taken from a pool of musical resources, and that there was very little, if any, unique creation by the senior author.<sup>269</sup> Genres serve as a good example of when a defendant can rely on this defence. If a defendant uses the same swing jazz rhythm as the plaintiff, the plaintiff will not succeed with an infringement claim, as the defendant will merely need to assert that the swing rhythm allegedly reproduced is a

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<sup>266</sup> *Newton v. Diamond* 204 F.Supp. 2002 2d 1244 1275.

<sup>267</sup> J S Sykes "Copyright – The De Minimis Defense in Copyright Infringement Actions Involving Music Sampling" (2006) 36 *U.Mem.L.Rev* 749 762.

<sup>268</sup> Eppler (2011) *U. Mem. L. Rev* 436.

<sup>269</sup> 436.



rhythm very common to jazz, and therefore the plaintiff has no exclusive rights to the use of the rhythm.<sup>270</sup>

#### 4 3 4 Estoppel

This defence is rarely used in music infringement cases. However, in theory it is possible that a defendant could rely on this defence where, for example, the plaintiff created a situation or an impression which led the defendant to copy the plaintiff's work whilst believing that their work would be non-infringing.<sup>271</sup> In these circumstances the plaintiff cannot claim copyright infringement, as they were the one responsible for creating the impression which led the defendant to reproducing a substantial part of the work.

#### 4 3 5 Unclean hands doctrine

This doctrine states that where the senior author unlawfully reproduces from another song, then he may not pursue a claim of copyright infringement against a junior author who reproduces the senior author's work.<sup>272</sup> Therefore, if a defendant can prove that the plaintiff misappropriated from elsewhere, then they may escape liability, provided they do not reproduce from other original and non-misappropriated parts of the senior work.<sup>273</sup>

#### 4 3 6 Independent creation

Copyright infringement cannot be found where a causal connection cannot be established. Therefore, if the defendant can establish that their work was created independently, then they will not be found to have been infringing, despite how similar the works may appear to be.<sup>274</sup> Simply put, "independent reproduction of a copyrighted musical work is not infringement".<sup>275</sup>

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<sup>270</sup> See *Black v. Gosdin* 1990 740 F.Supp. 1288 1292-1293 where the court addressed the issue of *scènes à faire* as a result of both parties having elements "common in country music that it constitutes one of the genre's 'stock' themes; See also *Walker v. Time Life Films, Inc.* 1986 784 F.2d 44 50.

<sup>271</sup> Sirois & Martin (2007) *Info. & Comm. Tech. L* 11.

<sup>272</sup> 11.

<sup>273</sup> See *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd* 1998 3 SA 938 (SCA) paras 30-31. The principle of *unclean hands* is relevant insofar as the court held that the plaintiff should not succeed with their claim on the ground that they acted dishonestly.

<sup>274</sup> Orth (1955) *U.Pitt.L.Rev* 246.

<sup>275</sup> *Arnstein v. Edward B. Marks Music Corp.*, 1936 82 F.2d 275 275.

## 5 Proposal for a standardised approach in music infringement proceedings

“The music industry, as well as the courts, are best served if something approximating a bright-line test can be established”.<sup>276</sup> This sentence best describes the real need for a standardised approach to be used by courts. Although the approaches thus far have served the courts well, they are very subjective, and at times create uncertainty. Courts can easily reach different outcomes based on what methodology they apply in a given case. It is therefore submitted that the courts, where possible, should conform to the use of a single approach in order to promote fair and certain outcomes.

The first proposed test was that mentioned in *Arnstein* which has been thoroughly discussed and need not be rehashed. For the sake of refreshing the reader, the *Arnstein* bifurcated test involved the use of expert witnesses in determining if the works are strikingly similar.<sup>277</sup> The purpose of this is to determine if the junior author had access to the senior work. Thereafter, the court relied on the lay listener in determining if a substantial part had been reproduced.<sup>278</sup> Both legs of the test must be satisfied for there to be a finding of infringement.

The second proposed test is similar to the one discussed above, except for the lay listener test, which is substituted with an audience test as discussed in part 4 2 1 1 above.<sup>279</sup> This test also suggests the use of expert witnesses in the second leg of the test, but with the purpose of enhancing the audience test rather than using it as an isolated test in determining infringement.<sup>280</sup>

A useful analogy has been made for the second proposed test, which is worth quoting in full:

“The underlying logic of the test seems to be that copyright infringement is technically a theft, but a theft of a very special type. First, it is important to identify the thief - the threshold copying issue. Second, it must be determined whether this is the kind of theft copyright law is supposed to prevent. This is the illicit copying issue. On the first issue, experts are allowed to dissect the work, to make certain that plaintiff has brought suit against the proper defendant. On the second issue, audience reactions are employed, because audience

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<sup>276</sup> 799.

<sup>277</sup> *Arnstein v. Porter* 469.

<sup>278</sup> 469.

<sup>279</sup> Sitzer (1981) *S.Cal.L.Rev.* 408.

<sup>280</sup> 408.

reactions are the guide to infringement of plaintiffs (*sic*) market interest, the true substance of copyright.”<sup>281</sup>

It is submitted that insofar as the substantial part test is concerned, an audience test should be considered. However, it should be used in conjunction with expert assistance so that the audience member can accurately identify the substantial part, followed by making an objective comparison of the similarities. The use of expert witnesses in determining the reproduction of a substantial part might more easily result in a finding of infringement due to the fact that experts over-analyse the music in a way that no lay listener or audience member would think to consider.<sup>282</sup> This ‘over-analytical’ approach of the experts should also be commended, especially as experts are prone to finding relevant similarities and they are doing a very thorough job by providing the court with all the necessary information before a decision is made. Ultimately, the court has the final say in copyright infringement proceedings. Therefore, they can filter out the important evidence from the non-important evidence. Experts should perhaps specifically be used for the substantial part test where the music concerned is practically difficult to appreciate fully, such as classical music, or jazz. In these styles, the composers make use of very technical and complicated methods of composition in creating unique works of music, and therefore experts will be able to better understand if reproduction has occurred or not.<sup>283</sup> The *Arnstein* case has done well with its use of the test, and this test has been used in various music infringement cases with little change to the test itself. It is therefore submitted that the *Arnstein* test should be used, but with the two substitutions. These substitutions are the lay listener test with the audience test, and the addition of expert witnesses to assist the lay listeners in reaching a finding.

In addition to the proposed test, it is further submitted that the judge, in applying an expert assisted audience test, should also consider the musical context from which the appropriated part has come. As discussed above,<sup>284</sup> a melody is given meaning based on the surrounding harmony and performance factors, otherwise referred to throughout this paper as the musical context. A judge must consider if the essential musical kernel has been reproduced, but also whether the meaning that is attributed

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<sup>281</sup> 408.

<sup>282</sup> 403.

<sup>283</sup> 408-409.

<sup>284</sup> See discussion above of *Northern Music v. King* 20-22.

to such melody as a result of the musical context has been carried across into the junior work. If identical melodic notes are appropriated from a senior work and placed in a junior work, it may not always result in a finding of infringement. The finding will depend on what degree the junior work differs with regard to the other musical elements such as harmony, rhythm, key and so forth. The inclusion of expert assistance in the audience test will allow the audience member to identify the valuable parts of a song, and whether or not they have been reproduced. Without such expert assistance, it is unlikely that the audience member would be able to appreciate these considerations. It is therefore advised that the courts add this consideration to the above mentioned test when dealing with these types of cases.

Regardless of the type of work protected by copyright, the infringement tests remain the same. These above approaches may however be adopted relatively easily within the general copyright infringement framework. The adoption of these approaches will not supplant the copyright infringement tests in any way, but rather, will assist the courts in finding the substantial part of a song, as well as finding objective similarity between two musical works. The use of a standardised approach should be used as an aid to help the court confirm a finding.

## **6 How to copy a song with impunity**

Finally, this paper reaches the point where it hopes to answer the question proposed by the title. This chapter serves as a brief synopsis on the main points addressed in this paper with regard to music infringement, and although the reader is encouraged to read the paper in its entirety, this chapter will serve as a brief 'how to' guide for the wondering musician. It must be appreciated that the tests determining if there is music infringement are very subjective, so there is no clear cut method for reproducing a song without fear of infringement. However, this paper now equips the reader with a deeper insight as to what courts may look for. Consequently, the reader or composer might use this knowledge to avail themselves by ensuring that they do not fall into the same traps that composers who have found themselves to be litigants in copyright infringement proceedings have fallen into in the past.

At the outset a composer should endeavour not to have reference to any existing musical work and to create their own work *de novo*. If they do not copy an existing

work, then they cannot infringe copyright even though there may be a large measure of similarity between their musical work and a prior work or works.

In a case where the junior composer is minded to copy an earlier work to some degree, first and foremost, it is imperative that reproduction of the melody of a song is avoided. In most cases, the reproduction of the melody has led to a finding of infringement, due to the fact that the melody is most often regarded as the qualitative 'heart' of a song. Where reproduction of the melody is unavoidable, it is suggested that the reader change enough of the musical context, or the underlying harmonic and rhythmic structure so as to make the melody sound different.<sup>285</sup> This will result in the two works sounding less similar, which may lessen the chances of a finding of infringement.

Furthermore, it is advised that as little as possible of the melody should be reproduced. This may not always protect the reader against music copyright infringement, especially if a qualitatively substantial portion of the song is reproduced, but the chances of reproducing a substantial portion of a song greatly increase when more parts of the song are reproduced.<sup>286</sup>

The reader should also prevent copying parts in a song which have been repeated throughout the song, such as in the chorus. The more a part is repeated in a song, the more likely it will become popular to the listeners. The courts may certainly regard repetition as an important factor,<sup>287</sup> although a repeated portion in a song may not always be the original part of a song, and the reproduction of said portion may therefore not result in the reproduction of a substantial part. It must be emphasised that for there to be a finding of copyright infringement, a substantial part of a song must have been reproduced. If the repeated portion, or any portion for arguments sake does not contain that qualitative element which makes the reproduction of the portion a reproduction of a substantial part, then there will be no infringement. However, the reader must be aware that it is possible that the repeated portion could contain said qualitative element discussed above. When a composer composes a song, and exerts effort in creating an original hook or musical phrase in a song, he will likely be aware that said phrase will attract the listeners as it is pleasing to the ears. For this reason it

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<sup>285</sup> See Keyt's argument above 21-22.

<sup>286</sup> *Designers Guild v Russell Williams* 125.

<sup>287</sup> Christian (2004) *Vand. J. Ent. L. & Prac* 139-140.

makes sense for the composer to repeat the phrase so as to maximise the aural experience and it is suggested that the reader be aware that the reproduction of a repeated portion could amount to a taking of a substantial part.

There are certain sections of a song which are usually composed with the intention of attracting the listener. The reader should avoid reproducing from these parts, for example, the introduction of a song, or a chorus. Other sections such as a verse, bridge or solo exist to make the song more complete, but they do not specifically fulfil the function of attracting the listeners. A composer will often expend most of his labour in these parts as these are the parts which ordinarily hook the listeners. Therefore, it is advised that these parts are not reproduced as they may contain that qualitative element which if reproduced would result in copyright infringement.

The reader should get in to the habit of placing themselves in the shoes of a lay listener and ask which portion of the song they find most attractive or 'catchy'. Which part is likely to get stuck in their head, or which they might unconsciously whistle or hum. It is submitted that those parts which are catchy are most likely the valuable portions of the song and should not be reproduced, unless the context which those catchy parts are placed in is so significantly different that there is no resemblance between the two songs. Again, it is not always true that the reproduction of a 'catchy' part would amount to a taking of a substantial part; however, the probability that the catchy part is the original part of the song is quite high, as has been seen from case law.

To avoid liability it is important to stay below the substantial part threshold, but of course, this threshold is never easy to find. By making use of the processes identified above, the reader may stay below the figurative threshold.

## **7 Conclusion**

Despite music copyright infringement proceedings being plagued by subjective and difficult inquiries, the courts have done well to overcome this problem by providing useful means of ascertaining whether a substantial part has been reproduced or not. The US courts have offered the most insight into determining whether a substantial part has been reproduced, and although there are some differences in copyright laws between the different jurisdictions, it is submitted that the findings of the US courts could apply equally to South African music copyright infringement cases. However,

the US cases have slightly emphasised the use of the objective similarity test, more so than the substantial part test, but both tests are necessary for a finding of infringement. The South African courts are at an advantage having the US courts at their disposal, and the courts will find support should they start to make use of the tests and methodologies of the other courts, as discussed throughout this paper. It is worth emphasising again that these US tests are not really tests, but more akin to methodologies or approaches. It is submitted therefore that as these are merely approaches, they may be imported quite easily into the South African copyright infringement framework. They are flexible enough to be adapted and moulded to how the courts want to use them. They will not cause, nor require, any restructuring of the current infringement tests as applied by South African courts, and will easily fit into any music infringement proceeding.

To a degree, musical works require their own set of skills in deciding if a substantial part has been reproduced, due to the inherent characteristics of the works which make them differ from any of the other protectable expressions. A judge can look at a painting and determine if there is similarity between two artworks. However, for music the judges must rely on their hearing, and not sight, and although they may be able to find similarity, they may not necessarily understand how or why. It is this lack of understanding or skill that may cause incorrect results, and hence the reliance on expert testimony. But the reliance on expert testimony may also result in incorrect outcomes, as discussed above.

The lay listener approach is not without its faults. The main issue with this test is that the public do not understand enough about music theory and copyright law to exercise a logical decision. Much of the lay listener's findings rest on what they 'feel' sounds similar, or on a general impression they are given.<sup>288</sup> The labour expended by the copyright owner therefore rests on the ears of the impressionable lay listeners, and their findings in this regard may not always be fair.<sup>289</sup> And as discussed, the lay listener is not always skilled enough to distinguish between substantial parts compared against non-substantial parts, and they might find infringement based on similarity of non-substantial parts. It is for this reason that expert assistance is advised.

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<sup>288</sup> Nimmer *Nimmer on Copyright* (1970) §143.52.

<sup>289</sup> §143.52.

There is no single approach which is entirely appropriate for deciding if a substantial part has been reproduced, and it is therefore contended that a hybrid test be adopted, as was done in *Arnstein*. However, *Arnstein* was too formal in its approach, specifically in how it delineated expert testimony for determining striking similarity, and the lay listener for determining substantial similarity. The methodology, as adopted by *Arnstein*, is well ahead of its time, and gives due recognition to both the lay listener and expert test. However, it is submitted that an audience test be used in conjunction with expert assistance. If South African courts were to have a music infringement case much like the ones discussed throughout this paper, then the courts would be well off to apply a test akin to that of *Arnstein*, with the previously mentioned substitutions.

Upon a finding of infringement, the defendant has a range of defences which can be raised. The most popular being fair dealing and *de minimis*. The success of these defences depends on a range of factors, but given the nature of the copyright works dealt with, namely music works, it is not often that courts will find a valid defence where there has been the appropriation of a substantial part, unless it was done for one of the grounds mentioned in the fair dealing provision.

Music infringement cases are a fascinating species of copyright claims. They bring with them their own set of tests, defences and problems which are unique to this kind of work. Perhaps it is fortunate that South African courts have not been troubled by many music infringement cases, as the courts may struggle to determine if there was an infringement or not. Nonetheless, the courts have done very well to apply copyright law principles to other non-musical work cases, and it is hoped that they will deal with music infringement cases in the same manner that they have dealt with the other copyright claims. However, it is advised that they adopt the methodologies identified in this paper. Music infringement cases should not be treated in a nonchalant manner. They require the full attention of all the parties involved, as well as undivided mental contribution, so that a just result may be reached. It is hoped that this paper has made the reader more aware of the complicated issues surrounding these types of claims, and that the reader is now more equipped to better understand these issues and how to overcome them.



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