"Discontented Blues": Jazz Arrangements and the Case for Improvements in Copyright Law

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“I think there are only three things that America will be known for two thousand years from now: the Constitution, jazz music, and baseball, the three most beautifully designed things this country ever produced.”

Two things listed above—the Constitution and jazz—might be distinctively American, but one needs help from the other. While jazz arranging “is alive and well” as a creative art, this sentiment might not hold true regarding its status under current copyright law, as jazz arrangements have grown increasingly complex and creative. Copyright law must ascertain a better method to afford protection to jazz arrangements, as the Copyright Clause of the Constitution mandates the

1. THE OXFORD COMPANION TO JAZZ 3 (Bill Kirchner ed., 2000) (quoting Gerald Early, author and cultural historian).

2. John McDonough, The Lost Art of Arranging, DOWN BEAT, Jan. 1996, at 24, 25 (quoting jazz composer, arranger, and historian Bill Kirchner); see also Doug Ramsey, Big Bands and Jazz Composing and Arranging After World War II, in THE OXFORD COMPANION TO JAZZ, supra note 1, at 403, 417 (“Without question, the big band is alive. It is unlikely ever again to dominate popular music, but its future as a medium for serious artistic effort seems assured.”). Though some worry that arranging might be “a lost art,” one stalwart wholeheartedly disagrees: “It couldn’t be a lost art,” says Gerry Mulligan, “not when you’ve got the kind of practitioners you do today who know the big band inside-out and are teaching other generations behind them. There’s some great writing going on.” McDonough, supra, at 25.

3. See infra notes 12-16 and accompanying text.

4. The term “jazz arrangement” has several meanings. Note, Jazz Has Got Copyright Law and That Ain’t Good, 118 HARV. L. REV. 1940, 1954 (2005). It can refer to improvised performances in which jazz musicians use an existing song as a “jumping-off point[] for their own spontaneous compositions, borrowing the harmonic skeleton and parts of the melody from the underlying [work].” Id. at 1942. This Comment will focus on the narrower type of “jazz arrangement,” which is a “written-down, fixed, often printed and published version of a composition, usually for one of the various standard jazz ensembles (jazz orchestra, big band, small group, etc.).” Gunther Schuller, Arrangement, GROVE MUSIC ONLINE, § 1, http://www.grovemusic.com/shared/views/article.html?
promotion of creativity.\footnote{5}

One can trace jazz arrangements back to the 1920s, not by chance coinciding with the so-called birth of jazz in the United States.\footnote{6} The earliest arrangements varied in the size of group and often were less formal than current versions.\footnote{7} The “swing” era of the 1930s and 1940s ushered in a new and popular style of American music that relied on big bands.\footnote{8} Though the “big band” or swing era provided an opportunity for arrangers to showcase their works in front of mass audiences on a regular basis, it had musical drawbacks as well.\footnote{9} The big band era’s eventual
demise led to the birth of a more open-ended and artistically-driven environment in which jazz arrangers write more according to their creative instincts than a set formula.\textsuperscript{10}

Since the swing era, jazz arranging has grown increasingly creative as arrangers more often craft works according to their own desires and experiment so as to nurture their musical curiosities.\textsuperscript{11} Elaborate musical techniques have evolved, resulting in new methods to synthesize steadfast rhythms people desired in dance music. See John H. Merryman, \textit{Copyright Law and the Modern Dance Arrangement}, 23 \textsc{Notre Dame Law.} 481, 482 (1948). Merryman writes:

\begin{quote}
[I]t is necessary for the arranger so employ the song as to provide a continuous piece of music of three to five minutes playing time. To accomplish this the arranger will include two and a half to four choruses of the song in his arrangement. To avoid monotony and to take advantage of the resources of the orchestra, he will probably present these different choruses in different ways and with different instruments carrying the lead. . . . Modulations will be necessary to pass from one key to another; a beginning (introduction) and an ending will be provided. In writing for the orchestra, the arranger will not adhere strictly to the melody and phrasing of the original song, but will employ rhythmic and melodic alterations to suit his purpose. In all these respects there is room for originality and musical skill on the part of the arranger. In altering or adding to the original song, he becomes a composer in his own right, and it is for the protection of these contributions that he is awarded the copyright.
\end{quote}

\textit{Id.}

10. McDonough, supra note 2, at 24-28 (examining how diminishing market pressures have enhanced creative efforts); see also Schuller, supra note 4, § 1 ("Such arrangements range from strictly practical versions, designed primarily to serve commercial interests and wider professional dissemination—as in the 'stock arrangements' of the 1930s and 1940s—to highly creative recompositions . . ."). One can certainly distinguish between "purely practical" arrangements and those which involve more imagination on part of the arranger. Malcolm Boyd, \textit{Arrangement}, \textsc{Grove Music Online}, § 1, http://www.grove music.com/shared/views/article.html?section=music.01332 (last visited Apr. 11, 2006). As legendary composer and arranger Gil Evans describes, "[a] singer would want an arrangement that would sound OK with five men or fifteen men, so I would write some stock arrangement type things for singers. Not the greatest work by any means, but . . . ."

\textsc{BEN SIDRAN, TALKING JAZZ} 19 (Expanded ed., 1995) (second alteration in original).

11. See Boyd, supra note 10, § 1 ("Arrangements by creative musicians . . . often serve to illuminate the musical personality of the composer-arranger . . ."). Bill Holman, the 1998 Down Beat International Critics Poll "Top Arranger" winner, provides insight on how many modern jazz arrangers craft their works: "'If you want to make an arrangement sound like [jazz legend Thelonious] Monk, you can use things he played . . . But it's a much different thing to write a piece that sounds like me, using his music.'" Zan Stewart, \textit{Arranger: Bill Holman}, \textsc{Down Beat}, Aug. 1998, at 68, 68-69. Arrangers can also craft works to reflect a particular musician's style. \textit{See SIDRAN, supra} note 10, at 20 (describing Gil Evans's work on the album \textit{Miles Ahead} as a collection of "'seamless' [arrangements that] were almost a translation of Miles [Davis's] 'sound' into orchestral terms"). Or they can write to an individual's strengths. \textit{See id.} (discussing how "Duke Ellington would write for an individual, as opposed to just bringing different people to his notes").
expression. For example, jazz arrangers can alter the melody, reharmonize, or even change the entire rhythmic model of a work, any of which can dramatically redirect the movement of a work. In writing highly creative arrangements, jazz arrangers adapt original works into revitalizations of existing tunes, sometimes creating works that sound entirely new. Arguably, the more creative form of jazz arrangement

12. See, e.g., STURM, supra note 4, at 207-09. Arrangers have developed extensive harmonic techniques, such as chromatic planing ("a form of exact parallelism that occurs in concerted voicings when the lower voices move in the same direction and exactly the same interval as the lead voice"), close position voicing ("vertical structures with tight intervallic spacings of 2nds, 3rds, or 4ths between voices"), substitute chords ("chords that replace or decorate a given set of chord changes"), and synthetic harmony ("vertical structures that cannot be identified as idiomatic jazz chords; such formations are typically the result of strong independent voice movement"). Id. at 207, 209. They have also embraced advanced rhythmic and time-alteration techniques, like cross rhythm ("the coexistence of two or more rhythmic patterns or groupings") and elongation ("extending a phrase or segment by increasing the note values or adding material to reach beyond the normal length"). Id. at 207.

13. See id. at 15 (analyzing Jim McNeely's 1993 big band arrangement of "King Porter Stomp," in which McNeely "successfully blurred the seams between the original line [of one section] and his own melodic embellishment").

14. See id. at 52-53 (quoting Clare Fischer’s process for writing harmony). In describing how he wrote harmony for his 1991 arrangement, "O Pato Takes ‘A’ Train," Fischer explains that "I used different harmonies [than in the original work] as a basis . . . . I don’t approach it in the typical . . . context; I rely on intuition, where my ears tell me to go. As I go along with my harmonies, my voice leading leads me into structures that are mine." Id. at 52 (emphasis omitted).

15. See id. at 11 (describing how even the early jazz arrangers “emphasized rhythmic . . . embellishment as [a] primary tool[] in recasting an existing composition”). In 1994, Manny Albam wrote “Not Quite All of Me,” an arrangement of Gerald Marks and Seymour Simon’s “All of Me.” Id. at 9, 23. Albam “transformed the traditional . . . rhythmic feel of All of Me into a jazz waltz and expanded the harmonic rhythm” of the original work. Id. at 23.

16. Id. at 23. Fischer emphasizes the importance of harmony to the movement of the work, explaining that “as one [harmony] resolves, another one is set up, so that there is always a constant forming of tension and release at different levels in the same chord, and that is what propels the music forward.” Id. at 53 (quoting Clare Fischer).

17. Email from Fred Sturm, Kimberly-Clark Professor of Music, Lawrence Univ., to John R. Zoesch III (Oct. 17, 2005, 11:24:00 EST) (on file with author). Arranger Manny Albam also provides insight about creativity in arranging:

“Arrangement is really a composition—regardless of how much of it is decomposed or re-composed. After the opening statement of my arrangement, I decided that I didn’t have to adhere to the original anymore. I’ve done that all along; going back to the 1940s, I’d get a tune—especially well-known standards—and do something else with it. The concept of working with cells of rhythm and melody can come from many different places.” STURM, supra note 4, at 23 (emphasis omitted) (quoting Manny Albam).

18. See STURM, supra note 4, at 15 (offering a particularly interesting example of a “re-composition”). Sturm put together a historical case study of arrangements of older jazz works by a group of renowned jazz arrangers. Id. at 8-9. One in particular proved
reflects more on the new material than the underlying work itself.\textsuperscript{19}

Most jazz arrangements develop from "lead sheets" of original works.\textsuperscript{20} Because of the abundance of "standard" jazz works in this simple format, the jazz arranger has much freedom to embellish upon the original work.\textsuperscript{21} But arrangers do not limit their treatments to jazz standards, often utilizing works from such idioms as rock,\textsuperscript{22} classical,\textsuperscript{23} opera,\textsuperscript{24} and even movie and television themes.\textsuperscript{25} With such a wealth and variety of resources from which to draw, arrangers have a seemingly limitless realm of possibilities for new derivative creations.

Unfortunately, copyright law limits protection and incentives for creativity in derivative works.\textsuperscript{26} Under courts' current standards, several problems arise. First, a "practical" arrangement,\textsuperscript{27} if original enough to qualify as a derivative work, gains the same classification as a more substantial "creative" arrangement.\textsuperscript{28} Second, skilled arrangers can

\textsuperscript{19} See Schuller, supra note 4, § 1 ([I]t is the arranger's musical imagination and skill in terms of, for example, harmonic invention or orchestrational resourcefulness that will inform the final product much more than the original piece on which it is based.). So-called "recompositions . . . transform the basic material in a specific style or manner, in itself marked by a striking originality which may even surpass the quality of the original material." \textit{Id.}

\textsuperscript{20} Lead sheets are the most "raw" form of chart, typically containing the melody and chords to a given song. \textit{See, e.g.}, 2 THE NEW REAL BOOK (Chuck Sher & Bob Bauer eds., 1991). Often times, such printed versions are short in duration. \textit{See Merryman}, supra note 9, at 482 ("The ordinary popular tune is thirty-two bars long. [This amounts to] about one minute of playing time . . . .").

\textsuperscript{21} \textit{See STURM, supra note 4}, at 8. Most often, an arranger adjusts the composer's melody and rhythmic support. \textit{Id.} at 11. Other common alterations include chord substitution, reharmonization, and altered voicings. \textit{Id.} at 38. The arranger can also adjust the form of the work and orchestrate as he sees fit, and add introductions, interludes, and endings. \textit{See id.} at 92, 130, 168-69.

\textsuperscript{22} \textit{See, e.g.}, GIL EVANS, GIL EVANS PLAYS HENDRIX (RCA Records 1974); \textit{see also} Mizar 5, Posting of M5 to Mizar 5 slang me!, http://www.writingaffairs.com/mizar5net/index.php?p=66 (Feb. 21, 2005, 18:20 EST) (discussing Fred Sturm's recent project, \textit{Do It Again}, a collection of big band arrangements based on the music of Steely Dan).

\textsuperscript{23} \textit{See, e.g.}, VINCE MENDOZA, \textit{Pavane, on SKETCHES} (ACT Publishing 1994) (performing Maurice Ravel's "Pavane").

\textsuperscript{24} \textit{See, e.g.}, Bob Belden-Black Dahlia Biography, http://www.nujazzcity.com/blackdalia.html (last visited Apr. 8, 2006) (discussing Bob Belden and his arrangement of Puccini's Opera, \textit{Turandot}).

\textsuperscript{25} \textit{See, e.g.}, MARIA SCHNEIDER, \textit{Love Theme From Spartacus, on COMING ABOUT} (Enja Records 1996).

\textsuperscript{26} \textit{See infra} Part II.B-C.

\textsuperscript{27} \textit{See supra} note 10.

\textsuperscript{28} \textit{See infra} text accompanying notes 169, 195.
rework original songs so dramatically as to render the underlying work insignificant in comparison to the arrangement. Arrangers then face the dilemma of whether to copyright the arrangement as a derivative work and thus achieve lesser ownership, or to copyright the arrangement as an original work and risk infringing the underlying work. Courts must determine how to most effectively "promote the Progress of . . . Arts" so as not to endanger this unique brand of creativity.

This Comment will examine how the judiciary has defined musical arrangements as separately copyrightable derivative works and has established criteria that arrangements must meet in order to receive copyright protection. Next, this Comment will look at how courts apply the "substantial similarity" test to distinguish between allegedly infringing musical works. This Comment will then examine the various levels of musical expertise courts look to in deciding whether a work infringes the copyright of a previous musical work.

Upon evaluating the standards for arrangements and substantial similarity, this Comment will propose more workable standards for courts to apply when situations requiring such analyses arise. This Comment will also evaluate and suggest a more flexible standard for derivative works so as to accord adequate protection to jazz arrangements. Finally, this Comment will advocate for an expert-driven "intended audience" standard that provides a high level of particularized musical expertise in order to assist the judiciary in assessing protection for jazz arrangements.

I. THE JAZZ ARRANGEMENT AS A "DERIVATIVE WORK" UNDER U.S. COPYRIGHT LAW AND OTHER ISSUES OF MUSIC COPYRIGHT LAW

One could argue that no work is truly original, and that all existing works of art necessarily contain some elements and ideas from pre-
existing works.\textsuperscript{32} Music exemplifies this situation because only a limited number of notes and, consequently, note combinations, exist.\textsuperscript{33} The United States Constitution grants Congress the power “[t]o promote the Progress of Science and useful Arts,”\textsuperscript{34} and, utilizing this power, Congress protects “musical works” under the Copyright Act of 1976 (1976 Act).\textsuperscript{35}

\textsuperscript{32} See Emerson v. Davies, 8 F. Cas. 615, 619 (C.C.D. Mass. 1845) (No. 4,436) ("In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout."); see also Joseph K. Christian, Comment, Too Much of a Good Thing? Deciphering Copyright Infringement for the Musician, 7 Vand. J. Ent. L. & Prac. 133, 142 (2004) ("Musicians always listen to other musicians. ... [M]usicians are inspired by other musicians. Thus, a musician will inevitably hear things she wants to incorporate into her own music.").

\textsuperscript{33} See Gaste v. Kaiser, 863 F.2d 1061, 1068 (2d Cir. 1988) ("[W]e are mindful of the limited number of notes and chords available to composers and the resulting fact that common themes frequently reappear in various compositions ... "); Christian, supra note 32, at 133 ("There will inevitably be similarities between works since all music is made from a small set of notes, limited by the range of the performer or instrument, and limited even further by the patterns that most listeners appreciate."); Paul M. Grinvalsky, Comment, Idea-Expression in Musical Analysis and the Role of the Intended Audience in Music Copyright Infringement, 28 Cal. W. L. Rev. 395, 396 (1992) ("Because the musical language is limited, it is difficult to determine what portion of the language is at the disposal of the public to use and where the permission to use it stops, the point at which free use of the language becomes impermissible, if for no other reason than because it has been used the same way by someone previously."). Jazz presents a unique example of this as well, for improvisational musicians in particular borrow a from prior artists’ styles and methods. See King, supra note 4, at 278-79 ("[W]hile all musical genres may borrow from each other, jazz musicians seem uniquely focused on recasting and transforming standards ... [Jazz] takes preexisting material and spontaneously superimposes on that material new melodies, harmonies, and rhythms."). One could argue that jazz arrangements “codify” jazz improvisation to some degree, in that their published form presents works “fixed in [a] tangible medium.” 17 U.S.C. § 102 (2000) (describing that copyright protection only extends to those works whose expression is “fixed in [a] tangible medium”); see also infra note 35 (discussing the protection the Copyright Act of 1976 affords).

\textsuperscript{34} U.S. Const. art. I, § 8, cl. 8.

\textsuperscript{35} Copyright Act of 1976 § 101, 17 U.S.C. § 102(a)(2) (2000 & Supp. 2002), amended by 17 U.S.C.A. § 102 (West Supp. 2005). The Act protects “original works of authorship” and sets out a group of categories that receive its safeguard. Id. § 102(a). “Musical works” fall within the classification of “original works of authorship,” thereby guaranteeing composers the right to copyright their works and defend their rights against those who infringe their works. Id. Additionally, the Act limits protection to works “fixed in any tangible medium of expression.” Id. For example:

Suppose a person sits down at a piano and creates a new arrangement of a popular song. This would not by itself be an infringement of the copyright, because the person has not yet fixed the new arrangement in a tangible medium.

... [O]nce the new arrangement is fixed in a tangible medium, the reproduction right is violated, and there is tangible evidence of the violation.

Tyler T. Ochoa, Copyright, Derivative Works and Fixation: Is Galoob a Mirage, or Does the Form(gen) of the Alleged Derivative Work Matter?, 20 Santa Clara Computer & High Tech. L.J. 991, 1024 (2004) (footnote omitted). Thus, once the arrangement is printed or performed publicly, it falls under the Act. Id. To summarize, “[m]odern
A copyright owner also owns rights extending from the original work, such as the right to make "derivative works" based upon the original work protected by copyright.\textsuperscript{36} The Act defines a derivative work as "a work based upon one or more preexisting works . . . which, as a whole, represent[s] an original work of authorship."\textsuperscript{37} The Act allows individuals other than the original copyright holder to create and copyright derivative works, but implies that they must obtain consent to do so.\textsuperscript{38} Though authors of derivative works can obtain a copyright for their work, the protection afforded by the Act extends only to material original to the derivative work itself.\textsuperscript{39} The author of the original work maintains the exclusive right to the original work and to its material presence in a subsequent derivative work.\textsuperscript{40}

The 1976 Act classifies musical arrangements as a type of derivative work.\textsuperscript{41} Courts have long recognized the right to copyright a musical copyright law vindicates a composer's proprietary claims over a wide variety of uses of music, including written representations of music in notation form, as part of a dramatic or audiovisual work, and when embodied in a sound recording." Michael W. Carroll, Whose Music Is it Anyway?: How We Came To View Musical Expression as a Form of Property, 72 U. CIN. L. REV. 1405, 1417 (2004).

36. 17 U.S.C. § 106(2) (2000 & Supp. 2002). Section 106 grants the owner of a copyright "exclusive rights" over its use. \textit{Id.} § 106. Hence, "[t]he composer's rights can be infringed by unauthorized reproduction or distribution of written or recorded music, creation of musical works derived from the composer's work, and, significantly, public performance of the musical works." Carroll, \textit{supra} note 35, at 1417.


38. \textit{See} 17 U.S.C. § 103(a) ("[P]rotection for a work employing preexisting material in which the copyright subsists does not extend to any part of the work in which such material has been used unlawfully.").

39. \textit{See id.} § 103(b) (limiting the copyright in a derivative work "only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work"). One court described the relation between derivative and original works: "[A] work is not derivative unless it has been substantially copied from the prior work." Litchfield v. Spielberg, 736 F.2d 1352, 1357 (9th Cir. 1984). As explained by Nimmer, "a work will be considered a derivative work only if it would be considered an infringing work if the material that it has derived from a pre-existing work had been taken without the consent of a copyright proprietor of such pre-existing work." 1 NIMMER & NIMMER, \textit{supra} note 37, § 3.01, at 3-4.

40. 17 U.S.C. § 103(b) (stating that the copyright in a derivative work "does not imply any exclusive right in the preexisting material"). The statute clarifies that a copyright earned for a derivative work "is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material." \textit{Id.}

41. \textit{Id.} § 101. Section 101 provides that "[e]xcept as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following: . . . A 'derivative work' is a work based upon one or more preexisting works, such as a . . .
But unless the owner of the copyright to an original work agrees to allow another to make an arrangement of the work, the
copyright owner retains the sole privilege to make an arrangement and to protect their rights in the arrangement against infringing works.\textsuperscript{43}

A. The Requirement of Originality: A Required Threshold To Cross in Order To Qualify for Copyright Protection as a Musical Arrangement

To be the subject of copyright, a work must evince originality.\textsuperscript{44} Musical arrangements are no exception, as they also must possess sufficient originality to qualify for copyright protection.\textsuperscript{45} Courts' standards, however, vary as to the requisite level of originality necessary to copyright a musical arrangement.\textsuperscript{46}

1. Substantially New and Original as Distinguishable from the Original

Involving a dispute over a polka arrangement, \textit{Jollie v. Jaques}\textsuperscript{47} sheds light on the early judicial basis for the copyrighting of musical

\textsuperscript{43} See Edward B. Marks Music Corp. v. Foullon, 79 F. Supp. 664, 665-66 (S.D.N.Y. 1948) ("There is no doubt that the copyright owner of a musical composition has a right to make a version and arrangement."); aff'd, 171 F.2d 905 (2d Cir. 1949). In addition, Section 106 of the Copyright Act of 1976 also authorizes the owner of a copyright "to prepare derivative works based upon the copyrighted work." 17 U.S.C. § 106(2) (2000 & Supp. 2002).

\textsuperscript{44} See 17 U.S.C § 102(a) (2000) ("Copyright protection subsists, in accordance with this title, in original works of authorship . . . ." (emphasis added)); Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) ("To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity." (citation omitted)). "Originality is a constitutional requirement," \textit{id.} at 346, which "is the very premise of copyright law," \textit{id.} at 347 (quoting Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1368 (5th Cir. 1981); see also 1 NIMMER & NIMMER, supra note 37, § 2.01[A], at 2-9 ("Originality in the copyright sense means only that the work owes its origin to the author, \textit{i.e.}, is independently created, and not copied from other works."); Grinvalsky, SUPRA note 33, at 399 ("In music copyright infringement cases, the concept of originality is intimately tied to the copying aspect of copyright infringement."); Note, Originality, 115 HARV. L. REV. 1988, 1988, 1997 (2002) (claiming that "[l]awyers know that originality is the touchstone of copyright law" and that "copyright aims to encourage 'original' works of authorship").

\textsuperscript{45} See 1 NIMMER & NIMMER, supra note 37, § 2.05[C] ("[T]here appears to be a tendency to require a somewhat greater degree of originality in order to accord copyright in a musical arrangement.").

\textsuperscript{46} Friedman, supra note 8, at 132. Friedman writes that:

courts are far from consistent in their approach to this particular form of derivative work. Some courts have subjected the musical arrangement to excessive scrutiny and have set extremely high originality standards . . . . Other decisions reflect a complete disdain for weighing any creative effort, resulting in copyright protection for the most minimal amount of additional material.

\textit{Id.} (footnote omitted).

\textsuperscript{47} 13 F. Cas. 910 (C.C.S.D.N.Y. 1850) (No. 7,437).
Here, the plaintiff adapted a German public domain composition for use as the musical basis for a comedy called The Serious Family. The plaintiff accused the defendants' arrangement of infringing the plaintiff's original work arrangement. The defendants, however, denied that their version copied the plaintiff's work and instead argued that their version constituted an independently created adaptation. Moreover, the defendants contended that the plaintiff's arrangement did not possess the requisite originality to deserve copyright protection. Agreeing with the defendants, the court denied an injunction and held that although copyrights protect a composition "of a new air or melody," such a work must be "substantially a new and original work; and not a copy of a piece already produced, with additions and variations, which a writer of music with experience and skill might readily make."

The court in Cooper v. James followed a line of reasoning similar to the Jollie court when it denied copyright protection to an arrangement that added only an alto part to an existing three-part harmony songbook entitled The Sacred Harp. Holding that the additional alto part did not, by itself, create a "substantially new and original work," the court reasoned that "mere improvements" to known works cannot provide a claim to "any special rights whatever."

48. Id. at 911.
49. Id. at 913. The public domain work, entitled The Roschen Polka, served as the basis for plaintiff's arrangement, and the plaintiff admitted as much. Id. at 913-14.
50. Id. at 913.
51. Id. The defendants titled their arrangement "The Serious Family Polka." Id.
52. See id. at 913-14 (arguing that "The Serious Family Polka" was a "substantial copy" of the original German composition and that the plaintiff's changes equaled those that "any person of ordinary skill and experience in music could have made").
53. Id. Distinguishing between a copy of a previous version (the public domain work in this case) and a copyrightable arrangement, the court clarified that an arrangement with sufficient originality to be copyrightable "requires genius for its construction," while an arrangement that sounds "substantially the same as the old," (the work of "a mere mechanic in music") does not deserve protection. Id. at 913. The court added that "there may be great difficulty in distinguishing between those new compositions that do, and those that do not absorb the merit of the original work." Id. at 914. Given that each case has unique circumstances, the court also established that "[p]ersons of skill and experience in the art" are needed to determine issues of infringement. Id. Joel Friedman finds the Jollie standard to be "an incredibly strict standard," that if followed, would create a situation in which "no arrangement could ever be copyrighted." Friedman, supra note 8, at 133.
55. Id. at 872-73. The plaintiff left the songbook's three parts (soprano, tenor, and bass) substantially unchanged. Id. at 872.
56. Id. at 873. The court also stated that "anything which a fairly good musician can make, the same old tune being preserved, could not be the subject of a copyright." Id. at 872; see also Shapiro, Bernstein & Co. v. Miracle Record Co., 91 F. Supp. 473, 474 (N.D. Ill. 1950) (involving a claim of copyright infringement due to an allegedly identical bass
Similarly, in *Norden v. Oliver Ditson Co.*, the court refused to protect the plaintiff's choral arrangement of a Russian hymn, "Oh Light Divine," due to insufficient originality. While the defendant admitted to preparing its own arrangement from plaintiff's published adaptation, he changed not only rhythms, but also notes and harmonies which made his new lyrics "more singable." Holding that the plaintiff's arrangement did not contain substantial changes so as to make it distinguishable from the original, the court found that to be the subject of a copyright, a new version must possess more than "minor changes which any skilled musician might make." Accordingly, the plaintiff lacked standing to bring a copyright claim.

*Supreme Records, Inc. v. Decca Records, Inc.* involved arrangements of the same song by both the plaintiff and defendant. The complaint

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58. *Id.* at 416, 418. The arrangement consisted of English text translated from Russian, which required rhythmical changes due to a change in the number of syllables. *Id.* at 416. The plaintiff, however, did not change the harmony or pitches of the original Russian work. *Id.*

59. *Id.* at 416-17.

60. *Id.* at 418. The court also found that plaintiff's version "remained the same old tune." *Id.* What is significant about this holding is that the defendant had never seen the original Russian composition, but created its own version (with an entirely different set of lyrics) from the plaintiff's work exclusively. *Id.* at 416-17. A more recent decision evidenced a similar standard for originality. See *ZZ Top v. Chrysler Corp.*, 54 F. Supp. 2d 983, 985 (W.D. Wash. 1999). In *ZZ Top*, the plaintiffs asserted that Chrysler used part of their song as background music for a promotional video for the introduction of a car. *Id.* at 984-85. In defense, Chrysler challenged the originality of plaintiffs' work, and, hence, the validity of its copyright. *Id.* at 985. For valid copyright registration, the court stated that a work "need not be new, but only original." *Id.* (quoting *Sid & Marty Krofft Television Prods.*, Inc. v. McDonald's Corp., 562 F.2d 1157, 1163 n.5 (9th Cir. 1977)). The court held that the defendant failed to prove that *ZZ Top*'s guitar riff from the song "La Grange" was unoriginal; stating that the riff "contributed something more than a merely trivial variation, something recognizably [its] own," to the common idea of a guitar riff. *Id.* at 986 (alteration in original) (quoting *Sid & Marty Krofft*, 562 F.2d at 1163 n.5). More specifically, the court rejected the defendant's attempt to demonstrate the substantial similarity between the riff in "La Grange" and a separate work by Norman Greenbaum titled "Spirit in the Sky," which also contained a somewhat similar riff. *Id.*


63. *Id.* at 905. Plaintiff Supreme Records owned the master recording of Paula Watson's orchestration of the song "A Little Bird Told Me." *Id.*
alleged that the defendant’s arrangement misappropriated the plaintiffs’ property rights because the defendant’s arrangement was “similar to, and an imitation of,” the plaintiffs’ version.\(^6\) The court recognized that for a musical arrangement to receive protection against infringement, it must be distinct from the original composition such that “any person hearing it played would become aware of the distinctiveness of the arrangement.”\(^6\) Applying this standard, the court found that the plaintiff’s arrangement, which added an introduction, handclapping, choral responses, and some filler music, did not rise to the requisite level of creativity to warrant protection.\(^6\)


*Plymouth Music Co. v. Magnus Organ Co.*\(^6\) focused on the plaintiff’s book of Christmas songs, arranged specifically for the Magnus chord organ.\(^6\) The defendants argued that the plaintiffs did not hold valid copyrights to the disputed works because the works were only arrangements of works already in the public domain.\(^6\) Mostly disagreeing with the defendants, the court found that three-quarters of the arrangements contained enough originality to hold valid copyrights.\(^7\)

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6. Id. Both plaintiffs were concerned with Decca’s production of records with an allegedly infringing arrangement. *Id.*

6. *Id.*

6. *Id.* at 908 (emphasis omitted). The court also noted that, “in order that a particular arrangement be given recognition as such, the elements . . . introduced must involve creative ability of a distinct kind.” *Id.* at 913. Note that the lawsuit involved a claim for unfair competition as opposed to copyright infringement. *Id.* at 906. The court later expanded upon the requirements for separate recognition, notably that the work seeking protection “must consist of unique elements which combine to produce a finished product which has a being or distinctive existence of its own.” *Id.* at 909 (emphasis omitted).

6. *Id.* at 911, 913 (“Adding certain incidents, such as emphasis upon accent . . . does nothing to the essence of musical creation.”). The court saw these additions as “elements . . . well known in the art” and held that their use did not give rise to a claim of originality, but instead constituted changes “which would occur to any arranger.” *Id.* at 911. Additionally, an introduction to a piece accompanied by orchestra garnered no extra support, as “very few recordings begin with the mere singing of the song.” *Id.*


6. *Id.* at 677-78. Defendant Magnus Organ most likely initiated the reason for the controversy. The plaintiff Plymouth Music Co. originally licensed the defendant Magnus Organ Co. “to publish, print, distribute and sell” the book. *Id.* at 678. Magnus Organ ended its relationship with Plymouth and went on to sell the books under an agreement with another defendant, Charles Hansen Music. *Id.* Of the fifteen songs in the book, the plaintiffs claimed infringement of their rights for twelve songs. *Id.*

6. *Id.* at 679.

7. *Id.* at 680. Of the twelve songs in dispute, the court found that nine held valid copyrights so as to warrant the plaintiff’s claim of infringement. *Id.*
The court based this decision upon finding that the arrangements "contained 'at least a modicum of creative work,' sufficient to uphold the plaintiffs' copyrights."\(^7\)

In contrast, in *McIntyre v. Double-A Music Corp.*,\(^7\) the plaintiff added an introduction, additional bars of harmony, theme repetitions, and an ending to the existing song, "Tonight You Belong to Me."\(^7\) The court rejected the plaintiff's argument that the arrangement deserved copyright protection.\(^\) Finding the melodic and harmonic embellishments inconsequential and relying on expert testimony that the added introduction "was as commonplace among musicians as the fairy story beginning," the court found that such a "*de minimus* contribution[...]
[does] not qualify for copyright protection."\(^7\)

3. Woods v. Bourne Co.: *Some Guidelines for Originality*

A more recent case that discussed the requirement of originality in musical arrangements is *Woods v. Bourne Co.*\(^6\) At issue was Irving Berlin's piano-vocal arrangement of Harry Woods's song, "When the Red, Red Robin Comes Bob, Bob, Bobbin' Along."\(^7\) The Second

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71. *Id.* (quoting Consol. Music Publishers, Inc. v. Ashley Publ'ns, Inc., 197 F. Supp. 17, 18 (S.D.N.Y. 1961)). *Consolidated Music Publishers* involved a plaintiff who sought to protect its copyrighted compilation of public domain piano music. *Consol. Music Publishers*, 197 F. Supp. at 17. The court examined whether the addition of editorial matter such as fingering, phrasing, and expression markings provided sufficient originality. *Id.* Finding that the defendant's work effectively copied the plaintiff's, the court held that plaintiff's work contained "'at least a modicum of creative work,'" and, therefore, met the burden of originality amounting to "'a little more than a mere trivial variation.'" *Id.* at 18 (quoting Andrews v. Guenther Publ'g Co., 60 F.2d 555, 557 (S.D.N.Y. 1932)). One commentator notes that "there would have been little or no audible difference if the added markings "would probably not have affected the 'sound' of the work." *Friedman, supra* note 8, at 135. The 1976 Act also protects compilations. 17 U.S.C. § 103 (2000).


73. *Id.* at 683.

74. *Id.* The plaintiff based his claim for recovery upon the theories of common-law copyright and unfair competition. *Id.* at 682. While rejecting both claims, the court also added that plaintiff's composition would fail to qualify for a statutory copyright. *Id.* at 683.

75. *Id.* at 683. The court described the plaintiff's additions as "'[s]uch technical improvisations which are in the common vocabulary of music and which are made every day by singers and other performers.'" *Id.; see also* Fisher v. Dees, 794 F.2d 432, 435 n.2 (9th Cir. 1986) ("'[A] taking is considered *de minimus* only if it is so meager and fragmentary that the average audience would not recognize the appropriation.'").

76. 60 F.3d 978, 981 (2d Cir. 1995).

77. *Id.* at 981-82. Woods wrote the song in 1926, originally in lead sheet form, and the same year, entered into a Songwriter's Agreement with Irving Berlin's publishing company. *Id.* at 981. As part of the agreement, Woods transferred to Berlin the original song in addition to "'the right to make, publish and perform any arrangement or
Circuit adopted the district court's formulation of the originality standard and utilized it for purposes of analyzing the case at hand.\textsuperscript{78} The district court stated the following originality standards for derivative works:

> In order therefore to qualify as a musically "derivative work," there must be present more than mere cocktail pianist variations of the piece that are standard fare in the music trade by any competent musician. There must be such things as unusual vocal treatment, additional lyrics of consequence, unusual altered harmonies, novel sequential uses of themes—something of substance added making the piece to some extent a new work with the old song embedded in it but from which the new has developed. It is not merely a stylized version of the original song where a major artist may take liberties with the lyrics or the tempo, the listener hearing basically the original tune. It is, in short, the addition of such new material as would entitle the creator to a copyright on the new material.\textsuperscript{79}

The court determined that the original piano-vocal version registered by Irving Berlin with the copyright office did not constitute a derivative work.\textsuperscript{80} As such, the court found that any "independent creation distinguishing the lead sheet from the piano-vocal arrangement was attributable to Woods before he sold the Song to Berlin."\textsuperscript{81} Factually, expert testimony established that any variations in the piano-vocal version were "insubstantial."\textsuperscript{82} The court concluded that Berlin's arrangement was effectively Woods's original composition before Berlin received rights to the work.\textsuperscript{83} This finding proved significant because Bourne's contention rested on the premise that Berlin's version

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adaptation of the same." \textit{Id.} at 981-82 (quoting the songwriter's agreement). Berlin later published a piano-vocal arrangement of the song and obtained a copyright that named Woods as the author of the words and music, but listed no one else as the arranger. \textit{Id.} at 982. Berlin made subsequent arrangements of the song, as did Bourne, the defendant, who had succeeded Berlin to rights in the copyright. \textit{Id.} at 981, 983.

\textsuperscript{78} \textit{Id.} at 991.


\textsuperscript{80} See Woods, 60 F.3d at 991-92 (noting this was the case because "any original creativity that went into producing it was the result of Wood's effort and occurred before the rights in the composition were granted to Berlin").

\textsuperscript{81} \textit{Id.} at 992. The court held that the lead sheet and piano-vocal arrangement were two different versions of a single composition, even though they lacked literal identities. \textit{Id.} The court also gave weight to the fact that only Woods's name appeared on the copyright as author, and the district court's finding that Berlin credited Woods with authorship over the piano-vocal version. \textit{Id.} at 991-92.

\textsuperscript{82} \textit{Id.} at 992.

\textsuperscript{83} \textit{Id.} at 991-92.
constituted a separately copyrightable arrangement.\textsuperscript{84} If Berlin’s version had constituted a derivative work, Bourne, as Berlin’s successor in copyright, would have retained performance and royalty rights to that particular version.\textsuperscript{85}

Having decided that Berlin owned the copyright to Woods’s original composition, the court looked to Bourne’s 1981 arrangement of the song and its bass-line variation in order to determine whether it could constitute a copyrightable derivative work.\textsuperscript{86} The Second Circuit agreed with the district court’s conclusion that the arrangement “in no way exhibit[ed] the degree of creativity required to make it a derivative work.”\textsuperscript{87} Thus, the court found that, notwithstanding the non-derivative nature of Berlin’s work, none of Bourne’s arrangements rose to the level of independently protected derivative works.\textsuperscript{88} Accordingly, Bourne held no future performance or royalty rights in its arrangements of the song.\textsuperscript{89}

\textbf{B. Copyright Infringement of Musical Works: The “Substantial Similarity” Test}

Courts historically have protected the rights of composers from copyright infringement.\textsuperscript{90} To determine infringement claims, they apply the “substantial similarity” test.\textsuperscript{91} To determine whether musical works are substantially similar, courts most often look to elements of the composition.\textsuperscript{92} Courts also examine allegedly similar portions or segments of works to determine whether that portion gives rise to

\begin{itemize}
  \item \textsuperscript{84} Id. at 989.
  \item \textsuperscript{85} Id.
  \item \textsuperscript{86} Id. at 993. The Bourne arrangement differed in that it contained a “moving bass line” as opposed the original’s bass notes, which occurred on the first and third beats of every measure. Id. While a moving bass line adds, fittingly, more movement and flow to a work, it likely differed only in that it added “filler” notes on the second and fourth beats. This probably changed the feel slightly, but it does not constitute a substantial change to a work. This arrangement earned royalties for its use in a Delta Faucet commercial. Id.
  \item \textsuperscript{87} Id. (quoting Woods v. Bourne Co., 841 F. Supp. 118, 123 (S.D.N.Y. 1994), aff’d in part, rev’d in part, 60 F.3d 978 (2d Cir. 1995)).
  \item \textsuperscript{88} Id.
  \item \textsuperscript{89} See id.
  \item \textsuperscript{90} See infra Part I.B.1-3.
  \item \textsuperscript{91} See 4 NIMMER & NIMMER, supra note 37, § 13.03[A], at 13-33 (“Just as copying is an essential element of copyright infringement, so substantial similarity between the plaintiff’s and defendant’s works is an essential element of actionable copying.” (footnote omitted)).
  \item \textsuperscript{92} See 1 id. § 2.05[D], at 2-57 (“It has been said that a musical work consists of rhythm, harmony and melody, and that originality, if it exists, must be found in one of these.”); infra Part I.B.1.
\end{itemize}
infringement of an entire work. And some courts examine the "total concept and feel" of a work to decide infringement claims.

A seminal case in music copyright infringement law is *Arnstein v. Porter*. The plaintiff alleged that the defendant infringed his copyrights to several musical compositions. Stating the general standards by which to prove copyright infringement, the court required the plaintiffs to prove: "(a) that defendant copied from plaintiff's copyrighted work and (b) that the copying (assuming it to be proved) went so far as to constitute improper appropriation." After listening to the recordings of the works in dispute, the court found sufficient similarities between the works that, although not strong enough to warrant a conclusion of infringement by themselves, were strong enough to warrant remanding the case for a jury finding of fact if more evidence of infringement existed.

1. Courts Look to Elements of a Musical Work

a. Melody

Courts most often look to the melodies of competing works to determine the issue of substantial similarity. In a famous case, former

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93. See infra Part I.B.2.
94. See infra note 130 and accompanying text.
95. 154 F.2d 464 (2d Cir. 1946). One scholar described *Arnstein* as a "clearly articulated copyright approach" that "remains the most instructive guide to proving infringement." Alan Latman, "Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187, 1191 (1990).
97. Id. at 468. The court further stated that acceptable evidence of copying "may consist (a) of defendant's admission that he copied or (b) of circumstantial evidence—usually evidence of access—from which the trier of the facts may reasonably infer copying." Id. Because admissions of copying are rare, "[i]f there is evidence of access and similarities exist, then the trier of the facts must determine whether the similarities are sufficient to prove copying." Id. The court then stated that expert testimony could help in aiding a trier of fact to determine the issue of similarity. Id. Where there is no evidence of access, "the similarities must be so striking as to preclude the possibility that plaintiff and defendant independently arrived at the same result." Id. If copying is found, the issue becomes that of whether it constituted "illicit copying"; the court stated that the "ordinary lay hearer" should determine the legality of such copying. Id.
98. Id. at 469.
99. See, e.g., N. Music Corp. v. King Record Distrib. Co., 105 F. Supp. 393, 395, 397 (S.D.N.Y. 1952) (involving a copyright claim by the copyright owners of "Tonight He Sailed Again" against numerous defendants for "I Love You, Yes I Do"). In *King Record*, the court decided upon the issue of "whether the two compositions are similar." Id. at 397. The court noted the songs' "virtually identical" rhythmic patterns, similar points of melodic climax, similar patterns of harmony, and identical form (AABA, which is very
Beatle George Harrison faced a copyright infringement claim against his song, “My Sweet Lord,” in Bright Tunes Music Corp. v. Harrisongs Music, Ltd. The plaintiff claimed Harrison plagiarized its work, “He’s So Fine,” primarily through the “My Sweet Lord” melody’s patterned repetition of two motifs. Though the motifs were not particularly original by themselves, the experts who testified all agreed that the pattern of motifs in “He’s So Fine” resulted in a “highly unique” work. The melody repeated “motif A,” a three-note descending phrase, four times, followed by “motif B,” which was also repeated four times. “My Sweet Lord” contained an almost identical use of the same motifs, differing only in that Harrison’s work repeated motif B just three times, as opposed to plaintiff’s four. An additional similarity, the duplicative use of a grace note at the end of the second repetition of motif B, gave the court enough ammunition to make its finding. Almost solely due to its melody, the court found it “clear” that Harrison’s song was the “very same song,” declaring ultimately that it infringed “He’s So Fine.”

common among popular compositions). Id. Most importantly, however, the court found that the similarities in those passages “comprise[d] a significant and continuous portion of the melodies of both songs.” Id. Setting the standard for piracy at whether “the whole meritorious part of the song is incorporated in another song, without any material alteration in the sequence of bars,” the court found infringement based primarily upon “substantial melodic similarity.” Id. at 397-98. It also noted that within one strain of eight bars, the two melodies had sixteen notes in common, but more importantly noting that the similarity was not just in the number of similar notes, but how similar the songs sounded to the judge’s “untrained ear” while played simultaneously. Id.

Similarly, in Hein v. Harris, 175 F. 875 (C.C.S.D.N.Y. 1910), the plaintiff sought an injunction to prevent infringement of the copyright to “The Arab Love Song,” specifically asserting that the defendant imitated the melody of his chorus, id. at 875. Judge Learned Hand analyzed all seventeen measures in each work, noting that both were written in the same time and in minor key, and brushed off the fact that the songs differed in key because a transposition would yield “an almost exact reproduction” of the original melody. Id. at 876. He found the first five bars “alike, almost note for note;” a “striking similarity” in bars eight and nine; and duplications in bars ten through twelve. Id. All in all, Judge Hand found that thirteen of the seventeen bars were “substantially the same in each song.” Id. Due to the high degree of similarity, Judge Hand found that the defendant’s work infringed plaintiff’s song. Id.

101. Id. A “motif” is a short musical phrase. See id.
102. Id. at 178 & n.3.
103. Id. at 178. The notes were adjusted rhythmically so as to fit the words of the melody. See id.
104. Id. The court also took into account the similarities between the harmonies of each work. Id.
105. See id. at 178 n.5 (“This grace note . . . has a substantial significance in assessing the claims of the parties hereto.”).
106. Id. at 181. The court classified the two as “virtually identical except for one phrase” and different words. Id. at 180. Perhaps the most interesting aspect of this case surrounds the court’s conclusion that, despite Harrison’s claim that he did not know of his
b. Harmony

Although harmony by itself generally does not receive copyright protection,\textsuperscript{107} \textit{Tempo Music Inc. v. Famous Music Corp.}\textsuperscript{108} indicated that harmony might suffice.\textsuperscript{109} Duke Ellington's estate, namely his son Mercer and the Famous Music Corporation, sued the executor of Billy Strayhorn's estate claiming that Strayhorn did not have a protected interest in his harmonic contributions to subsequent arrangements of "Satin Doll," a song by Ellington.\textsuperscript{110} The court narrowed the issue to whether Strayhorn's estate could assert a right to the harmony and revised melody of two such arrangements "when used or performed without the lyrics."

Examining the issue of harmony, Judge Sand acknowledged harmony as inherently derivative because it usually accompanies an already-created melody.\textsuperscript{111} Rejecting the Ellington Estate's argument that harmony cannot itself give rise to a copyright, the court held that, although certain chords occur inevitably from a given melody, composers—especially in jazz and contemporary music—sometimes make especially creative use of harmony, which necessarily "influences the mood, feel and sound of a piece."\textsuperscript{112}

\textsuperscript{107} See 1 NIMMER & NIMMER, supra note 37, § 2.05[D], at 2-57 ("[C]ourts have hesitated to find the necessary originality in harmony, and it has been suggested that harmony cannot in itself be the subject of copyright." (footnote omitted)); see also N. Music Corp. v. King Record Distrib. Co., 105 F. Supp. 393, 400 (S.D.N.Y. 1952) (suggesting that because harmony has been "in the public domain for so long," it can not "in itself be the subject of copyright").


\textsuperscript{109} Id. at 169; see also Wihtol v. Wells, 231 F.2d 550, 554 (7th Cir. 1956) (finding that "the writing of the other three parts, alto, tenor and bass, was further original work" and upholding the plaintiff's copyright for that material).

\textsuperscript{110} \textit{Tempo Music}, 838 F. Supp. at 164.

\textsuperscript{111} Id. Because Strayhorn wrote the lyrics to "Satin Doll," no question existed as to whether his estate had an interest in the song when performed with the lyrics. \textit{See id.} at 164 n.2. The court later dismissed the revised melody as insufficient for copyright protection because it contained only a one note variation and was therefore insubstantial in terms of originality. \textit{Id.} at 167 n.7.

\textsuperscript{112} Id. at 167. Relying upon the notion that a copyrightable derivative work must consist of nontrivial original aspects and that the protection afforded the derivative work draws from its reliance on the previous work, the judge found that the only protected interests the "Satin Doll" derivative works would be those aspects new to the arrangements. \textit{Id.} at 168.

\textsuperscript{113} Id. at 168 (internal quotation marks omitted).
Instead of relying on the proposal of novel results as the standard for originality, the court deemed the creative process as most important, leading to its conclusion that "harmony can, as a matter of law, be the subject of copyright."114 The court’s refusal to grant summary judgment indicated the court’s more expansive view of copyright protection.115

2. An Extrinsic Approach: Looking to Specific Portions of a Musical Work

In some cases, a portion of a musical work will prove important enough so that copying (or nearly copying) it will warrant a finding of copyright infringement.116 Plaintiffs can face a difficult burden when claiming copyright infringement in this manner.117 Generally, if a portion

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114. *Id.* at 168-69. The court elaborated, stating that “[t]his emphasis on creative process rather than novel outcomes is consistent with the standard in other jurisdictions which emphasize creative inputs beyond mere technical changes any skilled musician could make.” *Id.* at 169 n.11 (citing McIntyre v. Double-A Music Corp., 166 F. Supp. 681 (S.D. Cal. 1985); Norden v. Oliver Ditson Co., 13 F. Supp. 415 (D. Mass. 1936); and Cooper v. James, 213 F. 871 (N.D. Ga. 1914)). The court also noted that, as in the case at hand where Strayhorn added harmonies to Ellington’s composition, “where the composition of the melody is completed by one person and the harmony is thereafter furnished by another, the harmony may be less likely to reflect originality than in those instances in which simultaneous composition of melody and harmony is utilized to create certain musical effects.” *Id.* at 169.

115. *See id.* at 171-72. The court, however, did not rule on whether Strayhorn deserved royalties for his work on those pieces. *Id.* What makes this case most applicable is that the court recognized harmony as a protectable element of a jazz arrangement. *Id.* at 167-69. While some works do not evince sufficiently originality in their harmony, the apparent standard of *Tempo Music* provides a distinction depending on the creativity inherent to a particular work. *See id.* at 169.

116. *See, e.g.,* Fred Fisher, Inc. v. Dillingham, 298 F. 145, 147 (S.D.N.Y. 1924). Plaintiff Fisher claimed that Jerome Kern’s song “Kalua” infringed his work “Dardanella” due to the alleged similarity of an *ostinato* (a repeating figure) in both the verse of Fisher’s song and in the chorus of “Kalua.” *Id.* The conflicting portion included only eight notes within two measures, repeated continuously. *See id.* at 146 (indicating that the effect of the repeating section was to imply the sound of surf to the listener). Judge Learned Hand noted that though a copyright covers an entire composition, “plagiarism of any substantial component part, either in melody or accompaniment,” could provide the basis for infringement. *Id.* at 147. The court found infringement for the plaintiff, Fisher, holding that not only were the figures similar, but they were also used in the same way. *Id.* at 147-48; *see also* Johns & Johns Printing Co. v. Paull-Pioneer Music Corp., 102 F.2d 282, 283 (8th Cir. 1939) (“The chorus of a musical composition may constitute a material and substantial part of the work and it is frequently the very part that makes it popular and valuable.”).

117. *See Christian,* *supra* note 32, at 133 (maintaining that “[w]hile it is relatively easy to detect wholesale copying of an entire work, copying of only a portion of an original work can be rather difficult to prove”).
of one work proves to be quantitatively and qualitatively similar to another work, it will infringe the original work.\textsuperscript{118}

\textit{Boosey v. Empire Music Co.}\textsuperscript{119} focused on the alleged similarity between plaintiff's song—about hearing the voice of a deceased loved one—and defendant's song, which "express[ed] the desire of a negro to go back to his old home in Tennessee."\textsuperscript{120} Although the only similar phrase between the two works consisted of the phrase with the lyrics, "I hear you calling me," the court found that this phrase contributed so greatly to the success of both works as to warrant a finding for the plaintiffs.\textsuperscript{121} The court rested its conclusion on the fact that such a powerful phrase would provide the economic basis for each work's success; thus justifying granting the plaintiff's motion.\textsuperscript{122}

Digital sampling presents a prime example of new musical works utilizing portions of previously existing works.\textsuperscript{123} Though \textit{Newton v. Diamond}\textsuperscript{124} presents a situation where a plaintiff fell short of obtaining copyright protection for a short segment of his music, it demonstrates a similar standard.\textsuperscript{125} In \textit{Newton}, the Ninth Circuit examined the claim that the music group Beastie Boys infringed flutist James Newton's copyrighted composition by utilizing a sound recording of a six-second, three note segment of the song.\textsuperscript{126} The defendants had obtained a license

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\textsuperscript{118} Newton v. Diamond, 388 F.3d 1189, 1195 (9th Cir. 2004), \textit{cert. denied}, 125 S. Ct. 2905 (2005); \textit{see also} Baxter v. MCA, Inc., 812 F.2d 421, 425 (9th Cir. 1987) (indicating that even when a specific copied portion makes up a small part of a work, the court can find substantial similarity if that portion is of qualitative importance).

\textsuperscript{119} 224 F. 646 (S.D.N.Y. 1915).

\textsuperscript{120} Id. at 647.

\textsuperscript{121} Id.

\textsuperscript{122} Id.; \textit{see also} Robertson v. Batten, Barton, Durstine & Osborne, Inc., 146 F. Supp. 795, 798 (S.D. Cal. 1956) (holding the defendants liable for infringement because they copied a portion of plaintiff's song that proved responsible for its commercial success and popular appeal). In \textit{Robertson} the plaintiff alleged infringement of his song, "The Happy Whistler," by defendants in their recorded advertisements for Burgermeister Beer. \textit{Id.} at 797-98. The court took an almost mathematical approach to find infringement, noting two bars in defendants' works that proved identical to two of the bars in plaintiff's four-bar "key melody." \textit{See id.} at 798. To complete its finding of infringement, the court declared that the defendant's song created an "impression on the ear of substantial similarity with that of plaintiff's." \textit{Id.}

\textsuperscript{123} \textit{See, e.g., Newton}, 388 F.3d at 1190. Sampling consists of "the incorporation of short segments of prior sound recordings into new recordings." \textit{Id.} at 1192.

\textsuperscript{124} 388 F.3d 1189 (9th Cir. 2004), \textit{cert. denied}, 125 S. Ct. 2905 (2005).

\textsuperscript{125} Id. at 1190, 1192-93.

\textsuperscript{126} \textit{Id.} at 1190. The three-note sample consisted of the notes "C—D flat—C, sung over a background C note played on the flute." \textit{Id.} at 1191. The Beastie Boys utilized the sample and repeated it throughout their song "Pass the Mic." \textit{Id.} at 1192.
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to sample a particular sound recording of the song, but never obtained permission to use the copyrighted composition itself.\footnote{127} Applying the substantial similarity test, the Ninth Circuit found that the sampled portion did not constitute a "quantitatively or qualitatively significant portion of the composition as a whole."\footnote{128} Relying on the Beastie Boys’ expert testimony, the court decided that the three-note section did "not represent the heart or the hook of" Newton’s composition, but instead was "‘simple, minimal . . . insignificant . . . common, trite,’" and "‘lack[ed] any distinct melodic, harmonic, rhythmic or structural elements’" and thus could not infringe the original copyright.\footnote{129}

3. An Intrinsic Approach: "Total Concept and Feel"

Some courts have applied a "total concept and feel" test to evaluate a copyright infringement claim in which works are compared not by an analytical framework, but rather by the songs’ overall similarities.\footnote{130} In

\footnote{127} Id. at 1190. The court "filter[ed] out" the licensed elements of the recording to determine whether the defendants infringed the underlying composition by itself, because "Newton’s copyright extends only to the elements that he fixed in a tangible medium—those that he wrote on the score." Id. at 1193-94. In this sense, Newton presents a unique sampling case, one which has more significance to the topic at hand. When dealing with infringement claims against the use of an actual sound sample, courts have imposed more stringent standards in allowing the use of samples of sound from copyrighted works (again, the defendants in Newton escaped this claim because they had licensed use of the recording). See id. The plaintiff in Grand Upright Music, Ltd. v. Warner Bros. Records, 780 F. Supp. 182 (S.D.N.Y. 1991), sought an injunction for defendants’ unlicensed use of a portion of music from plaintiff’s song “Alone Again (Naturally),” id. at 183. The Grand Upright court emphasized that the defendants knew they should have obtained a license and that even after plaintiffs denied their license requests, they proceeded to make use of the music. See id. at 184-85 (“[I]t is clear that the defendants knew that they were violating the plaintiff’s rights as well as the rights of others.”). Effectively, the ruling established digital sampling without a license as a per se copyright violation. See id. Additionally, a recent case in the Sixth Circuit established a bright-line rule for copyright infringement in digital sampling, requiring a copyright license in order to sample from a previously existing work. See Bridgeport Music v. Dimension Films, 383 F.3d 390, 398 (6th Cir.), amended by 401 F.3d 647 (6th Cir. 2004), amended in part by 410 F.3d 792 (6th Cir. 2005).

\footnote{128} Newton, 388 F.3d at 1195. The court considered the issue of "whether the unauthorized use of the composition itself was substantial enough to sustain an infringement claim." Id. at 1193. The court also looked to determine whether the use amounted to something more than a de minimus use, which would not rise to the level of substantial similarity. Id.

\footnote{129} Id. at 1196 (quoting Dr. Lawrence Ferrara, defendant’s expert).

\footnote{130} See 4 Nimmer & Nimmer, supra note 37, 13,03[A][1][c], at 13-43 to 13-48. The phrase was first stated in Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970). See also Michael L. Sharb, Comment, Getting a "Total Concept and Feel" of Copyright Infringement, 64 U. Col. L. Rev. 903, 931 (1993) (proposing a Redefined Total Concept and Feel Test to examine copyright infringement claims). Sharb suggests a five-
"Discontented Blues"

Baxter v. MCA, Inc., the "E.T." Theme came under attack. Plaintiff Leslie Baxter alleged that John Williams’s work infringed his 1953 composition entitled "Joy." Baxter alleged that the E.T. Theme "largely copied" his song. While the defendants argued that Baxter's claim centered solely on a six-note sequence within the works, the court instead viewed the case as resting on a broader examination of the works. The Ninth Circuit took up the question of whether the two works had "substantial similarity of expression," or general ideas. It explained the test as "intrinsic"—stating that determining similarity of expression proved "subtle and complex"—thus dismissing the suggestion to apply a bright-line rule to the substantial similarity test. In so finding, the court reversed the district court's grant of summary judgment, determining that "reasonable minds could differ as to whether Joy and Theme from E.T. are substantially similar."

step test to determine copyright infringement: First, the court determines whether the plaintiff holds a valid copyright; second, the court determines whether the defendant copied plaintiff's work; third, the court determines the protectability of the copied material; fourth, the court decides whether the defendant's taking of the plaintiff's protected expression rises to the level of improper appropriation; and finally, the court determines substantial similarity using the intended audience test. Id. at 930. This test is claimed to protect artists' styles and provide flexibility in assessing copyright claims, while at the same time providing predictability. Id. at 930-31. But with so many intricacies involved in the arrangements, and so many arrangements in existence, this solution seems too superficial to present solidly-grounded decisions on a consistent basis. At the same time, however, some arrangers prefer to alter the context of a work and adapt it to a different "feel." See, e.g., STURM, supra note 4, at 35 (providing the example of "Pato Takes 'a' Train," Clare Fischer's latin-style arrangement of Billy Strayhorn's "Take the 'A' Train").

131. 812 F.2d 421 (9th Cir. 1987).
132. Id. at 422-23.
133. Id. Baxter and Williams had known each other for many years, and Baxter proved at trial that Williams knew the song "Joy." Id. at 422.
134. Id. at 423.
135. See id. at 425 (leaving open the possibility for the jury to make a determination based upon the six-note sequence if it determined that the similarity was so confined).
136. Id. at 424. The appeal arose out of the district court's grant of summary judgment to Williams's work that "as a matter of law . . . there was no substantial similarity between the two works." Id. at 423.
137. See id. at 424-25 (identifying the appropriate means by which to test similarity expression as "the response of the ordinary reasonable person to the works").
138. Id.; see also Supreme Records, Inc. v. Decca Records, Inc., 90 F. Supp. 904, 912-13 (S.D. Cal. 1950). In Supreme Records, although the court held the plaintiff's musical arrangement unprotected, it nonetheless analyzed the plaintiff's work against the defendant's allegedly infringing arrangement. Id. Both songs had the same melody due to being derived from the same original work (hence neither could claim protection), but the court arrived at different impressions of the two works. Id. at 912. Finding the plaintiff's work to be "mechanical," "lacking inspiration," and possessing only the usual accompaniments and intonations, Judge Yankwich determined that defendant Decca's
C. Who's Listening? Discerning an Appropriate Standard for Evaluating Originality and Substantial Similarity

The finder of fact in any lawsuit can be either the judge or jury.139 Regardless of who presides in a given case, a court must determine not only the legal standard to apply to the issue of infringement, but also a listener standard with which to charge the finder of fact.140 Courts generally have adopted an ordinary, reasonable or lay observer standard to determine substantial similarity of expression in copyright infringement lawsuits, as explained in Sid & Marty Krofft Television Products, Inc. v. McDonald’s Corp.141 There, the Ninth Circuit held that “[t]he test to be applied in determining whether there is substantial similarity in expressions shall . . . depend[] on the response of the ordinary reasonable person.”142 Some courts have held otherwise, however, instead looking to the average member of the “intended audience.”143 Also, the level of deference given to expert testimony can vary depending on the standard applied.144

1. The “Lay Listener” Standard

Courts sometimes apply a “lay listener” standard.145 Baxter held that where the test of substantial similarity proves “intrinsic,” without reliance on external criteria, “‘[a]nalytic dissection’ and expert testimony arrangement sounded “full, meaty, [and] polished,” owing its different nature to a “more precise, complex and better organized orchestral background.” Id. The judge made it clear that he believed Decca’s recording was superior and, therefore, quite dissimilar from the plaintiff’s recording, except for the similar melody. Id.

139. See, e.g., FED. R. CIV. P. 38-39 (discussing the right to a jury trial and the implications of waiving that right—i.e., a bench trial).

140. See infra Part I.C.1-2.

141. 562 F.2d 1157, 1164 (9th Cir. 1977). The test apparently originated in Daly v. Palmer, 6 F. Cas. 1132, 1132-34 (C.C.S.D.N.Y. 1868) (No. 3,552), a case involving similar train track rescue scenes in separate plays, id. at 1132-34. The Daly court there stated the test as whether “the appropriated series of events . . . is recognized by the spectator, through any of the senses to which the representation is addressed, as conveying substantially the same impressions to, and exciting the same emotions in, the mind, in the same sequence or order.” Id. at 1138; see also Levine v. McDonald’s Corp., 735 F. Supp. 92, 97 (S.D.N.Y. 1990) (“[T]he substantial similarity inquiry is conducted from the perspective of the ‘ordinary observer . . . .’” (citing Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960)).

142. Krofft Television, 562 F.2d at 1164 (citing Int’l Luggage Registry v. Avery Prods. Corp., 541 F.2d 830, 831 (9th Cir. 1976), and Harold Lloyd Corp. v. Witwer, 65 F.2d 1, 18-19 (9th Cir. 1933)).

143. See infra Part I.C.2.

144. See infra Part I.C.2.

145. See, e.g., Baxter v. MCA, Inc., 812 F.2d 421, 424 (9th Cir. 1987).
are not called for; the gauge of substantial similarity is the response of
the ordinary lay hearer."

Other courts have promulgated a similar test in different ways. In
Decca Records, the court found that the appropriate standard for
determining infringement among different arrangements of a work
would require a judge to put himself "in the position of the average
person who would listen to the two records." From this perspective,
the judge would determine whether listening to one piece would confuse
the average person's ability to distinguish one piece from the other.

Likewise, in Northern Music Corp. v. King Record Distrib. Co., the
court tested similarity by determining "whether there is a resemblance
noticeable to the average hearer." Also, the court in Boosey
determined that it should evaluate the music "as the uninformed and
technically untutored public."

2. "Intended Audience" Test

In Arnstein, the Second Circuit described the appropriate audience for
determining copyright infringement of a musical work as follows: "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 . . . ." Though the
court allowed expert testimony, it stated that such testimony "will in no
way be controlling on the issue of illicit copying, and should be utilized
only to assist in determining the reactions of lay auditors."

Many courts have read Arnstein as supporting the notion that a lay
listener always should make the decision as to whether a work infringes
another. Arnstein's language, however, is narrower and only requires

146. Id. (quoting Krofft Television, 562 F.2d at 1164).
1950).
148. See id. (citing the difficulty in analyzing the similarity of two songs as opposed to
two pieces of literature).
150. Id. at 397. The court admitted that "we rely on the only other test (aside from
expert testimony) available to a judge, who is a musical layman." Id.
152. Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946). The court added that it
would test the issue of illicit copying by "the response of the ordinary lay hearer." Id. at
468.
153. Id. at 473.
the "lay listener" test as "a rule that has come to be stated too broadly" and suspecting
"that courts have been slow to recognize explicitly the need" to modify that test
appropriately to incorporate the intended audience idea).
such a lay-listener test where the intended audience of the work consists of lay listeners.  

The Fourth Circuit, in Dawson v. Hinshaw Music, Inc., seized upon the language in Arnstein and deemed the relevant inquiry to be that of the “intended audience.” The dispute in Dawson involved William L. Dawson’s arrangement of the spiritual “Ezekiel Saw De Wheel,” and Gilbert M. Martin’s alleged infringement of Dawson’s version. Having read the relevant test of substantial similarity as necessitating examination of the ideas in a work and the expression of such ideas, the court stated that expert testimony should provide insight into the similarity of two works’ ideas.

As for expression, the second prong of the substantial similarity test, the Dawson court held that a court should look to the type of audience the plaintiff intended the work to reach. The intended audience might well include lay observers, as in Arnstein, but

...
Given the nature of the work at issue in Dawson, the court held that the plaintiff should not be required to persuade a lay listener of the infringement of his specialized work, especially if the lay listener audience did not include anyone, such as choir directors, who would purchase Dawson's arrangement.\textsuperscript{162}

II. \textbf{INADEQUACIES IN THE CURRENT APPROACH TO ASSESSING THE CONTRIBUTIONS OF ARRANGERS}

\textit{A. Stuck on a Single Threshold Approach for Derivative Works}

Courts have applied a variety of standards to determine the requisite originality that an arrangement must possess for purposes of copyright law.\textsuperscript{163} Joel L. Friedman outlines several approaches courts can apply to test originality in a musical arrangement.\textsuperscript{164} He then proposes a combination of these approaches, suggesting that a judge should examine the actual material contributed and determine the material's level of creativity from its resulting "audio impression."\textsuperscript{165}

Another proposition is to redefine "derivative work" to mean "a work based significantly upon one or more pre-existing works, such that it exhibits little originality of its own or that it unduly diminishes economic prospects of the works used."\textsuperscript{166} This proposal, however, sets too low of a standard for qualifying as a "derivative work," similar to such standards like the "modicum of creative work" standard.\textsuperscript{167}

\footnotesize
\textsuperscript{162} See id. at 737 ("[S]piritual arrangements are purchased primarily by choral directors who possess specialized expertise relevant to their selection of one arrangement instead of another.").

\textsuperscript{163} See supra Part I.A.

\textsuperscript{164} See Friedman, supra note 8, at 136. He first details the "significant creativity test," which requires a contribution to the underlying work involving "creative ability of a distinct kind." Id. (internal quotation marks omitted). This test requires the court to examine closely the arranger's contribution and compare it to "the contributions of other arrangers." Id. Second, he outlines the "audio test," which compares the arrangement to the original work by way of a "listening" comparison. Id. Friedman compares this test to Nimmer's "distinguishable variation" test. Id. If an arrangement "leaves an impression of newness or novelty when compared to the underlying work, it will be subject to copyright." Id.

\textsuperscript{165} See id. at 137 ("This [test] would allow the works in the \textit{Supreme} and \textit{McIntyre} cases to be protected, and yet would exclude from protection the works in \textit{Consolidated Music}").

\textsuperscript{166} Noami Abe Voegtli, \textit{Rethinking Derivative Rights}, 63 BROOK. L. REV. 1213, 1267 (1997). This proposed definition would make it less burdensome for jazz improvisers to copyright their performances and recordings. See Note, supra note 4, at 1956. Because they deviate so much from underlying works, improvised works evaluated under this standard would qualify as separate original works, apart from an underlying work to which they otherwise would owe rights. See id.

\textsuperscript{167} See supra note 71 and accompanying text.
While these proposals appropriately attempt to shift the focus towards additions to, rather than taking from, underlying works, the proposals fail, as do courts, to provide a framework to differentiate more substantial derivative works from those which barely surpass the minimal standard required. Arrangers who far surpass this single threshold of originality might instead copyright their works as separate original works, risking potential claims of copyright infringement by the underlying composer.

B. Copyright Law and Its Incentives for Creativity

The United States Supreme Court has stated that while the immediate effect of copyright law is to provide monetary incentives for the creative labors of authors, "the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." Economic incentives, however, often drive this ultimate goal. Professor Paul Goldstein points out the difficulty that can arise in distinguishing between infringing works and non-infringing derivative works, and, therefore, highlights the problem that "[t]he works at the outer reaches of this continuum, and some intermediate works as well, will frequently bear scant resemblance to the expression or the ideas of the seminal work and will often be connected only by a license authorizing use of a title or character name." Goldstein argues that "[c]opyright is made to do too

168. See Note, supra note 4, at 1956.
169. See supra notes 163-67 and accompanying text.
170. See supra note 30 and accompanying text; infra note 173 and accompanying text.
171. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).
172. See id. at 217. Another commentator claims that two underlying rationales exist: economic and moral. See Sharb, supra note 130, at 906 ("The author has a natural right to reap the benefits of his or her creation.").
173. Goldstein, supra note 172, at 217. The author also notes that "the point at which the right 'to reproduce the copyrighted work in copies' leaves off and the right 'to prepare derivative works based upon the copyrighted work' begins [is where] the contribution of independent expression to an existing work effectively creates a new work for a different market." Id. Goldstein further explains that "[t]he central problem is that all works are to
much in resolving these cases in favor of the owners of underlying works,” giving the owners too much power over future derivative works.\textsuperscript{174}

Others have expanded this argument, claiming that giving original authors such strong ownership rights creates monopoly power in the original work.\textsuperscript{175} The greater the copyright protection for original works, they argue, the less incentive there is for others to produce creative works, especially derivative works.\textsuperscript{176} One concern is that the owner of the underlying copyright would not approve of a proposed derivative use.\textsuperscript{177} Still, others point to the importance of allowing the underlying

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{174} See id. at 222.
\item\textsuperscript{175} See, e.g., Stewart E. Sterk, \textit{Rhetoric and Reality in Copyright Law}, 94 MICH. L. REV. 1197, 1204-05 (1996) (“Any copyright protection beyond that necessary to compensate the author for lost opportunities would generate no additional incentive to create . . . .”). Professor Sterk claims that “[t]o the extent that copyright protection eliminates copyiers from the market, the original author becomes a monopolist in the market for his copies of his work.” \textit{Id.} at 1205.
\item\textsuperscript{176} See \textit{id.} at 1207 (“[S]ome copyright protection is necessary to assure authors a financial return on the time and energy devoted to creative activity. . . . [G]iving authors additional copyright protection will reduce the supply of new works because the number of marginal authors deterred from creating . . . will exceed the number encouraged to create.”); see also Amy B. Cohen, \textit{When Does a Work Infringe the Derivative Works Right of a Copyright Owner?}, 17 CARDOZO ARTS & ENT. L.J. 623, 657 (1999) (describing the concern that “[g]iving copyright owners too much control may prevent derivative users from being able to improve and build upon those underlying works and thus to create new works of authorship”).
\item\textsuperscript{177} See Bob Belden-Black Dahlia Biography, \textit{supra} note 24 (providing a biography of jazz arranger Bob Belden, with his commentary). During the early 1990s, Belden wholly engaged himself in a massive project to recreate Puccini’s famous opera, \textit{Turandot}. \textit{Id.} Belden explains:

\begin{quote}
“The subject matter and melodic nature of ‘Turandot’ were exactly what I wanted to deal with. It was about love, as most tragic operas are, and it was about the quest for unrequited love and eternal love set against a social backdrop that put obstacles in the way. Nobody had ever covered an opera before, and I did it in such a way that I was able to transform the musicians who were involved on the record into following the personalities of the characters in the opera.”
\end{quote}
\textit{Id.} (quoting Bob Belden).

This had a profound effect on Belden’s career at that point: “The recording was suppressed by the publisher, which put me into a terrible state of artistic depression. I felt I could not express myself any more than that record at that time. I stopped writing
author sufficient interest in subsequent uses. Copyright law must strive to strike an appropriate balance between authors of original works and those who improve upon those original works by creating derivative works.

C. "Improvements" in Copyright Law

Professor Mark A. Lemley is among those who suggest that copyright laws do not provide sufficient incentives for the creation of derivative works, for if unlicensed, the authors of the derivative work hold no rights in their improvements if the derivative work is found to infringe. Lemley points out that copyright law affords different levels of protection to improvements through the law's derivative works right; and defines three applicable groups of improvers in copyright law: minor improvers, significant improvers, and radical improvers.

Minor improvers "advance[] social utility by adding to the basic [work], but who do[] not contribute enough to justify receiving music." Id. (quoting Bob Belden). The project abruptly came to an end in the United States, however, when the publisher and Puccini's estate blocked the production of Belden's tremendous undertaking. Id.; Don Williamson, Black Dahlia, ALLABOUTJAZZ.COM, http://www.allaboutjazz.com/reviews/r0401_002.htm (last visited Apr. 10, 2006). Given that Belden's work would likely influence an entirely different market than Puccini's opera, one could argue that halting the release of such a large-scale work hardly advances creativity in the arts. See, e.g., Bob Belden-Black Dahlia Biography, supra note 24.

178. See William M. Landes & Richard Posner, An Economic Analysis of Copyright Law, in ECONOMIC ANALYSIS OF THE LAW 83, 91-92 (Donald A. Wittman ed., 2003) (claiming that giving the author of a derivative work too much power would cause the original author to delay publication, thus inhibiting incentives for creating works—and suggesting that "giving the original author a monopoly of derivative works [would] reduce transactional costs"); see also Cohen, supra note 176, at 657 ("Giving copyright owners too little control may inhibit the creation of works by denying those owners the economic rewards needed to stimulate creation . . .").

179. See PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 6 (1994) (stating that decisions surrounding copyright law, "whether made in the courts, legislatures, or private law offices, have a single result: when copyright gives control to one person, it extracts some measure of freedom to imitate from everyone else"); Cohen, supra note 176, at 657 ("Both courts and commentators have struggled to define the best approach to use in balancing the rights of copyright owners with the rights of derivative users in order to best serve the public interest in creation of and access to original works of authorship.").

180. Lemley, supra note 30, at 992, 1013-29, 1073-83. Lemley states that "[c]urrent copyright doctrine effectively assigns the rights in unlicensed improvements made by third parties to original creators, by denying the improver copyright protection in his original expression and declaring any creation of such derivative works to be infringement." Id. at 1074; see also 17 U.S.C. § 103(a) (2000) ("The subject matter of a copyright . . . includes . . . derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.").

181. See Lemley, supra note 30, at 1019-29.
[protection] on the improvement," thus their works fail to rise to the level of a derivative work.182 Minor improvers likely would infringe the underlying work and, thus, their work would fall exclusively under the protection of the original copyright.183 For example, an arrangement that does not contain enough originality to qualify as a separate copyrightable derivative work would constitute a minor improvement under Lemley's proposal.184

Significant improvers contribute original, creative expression to a copyrighted work, and, therefore, such contribution would typically qualify as a derivative work.185 Lemley notes the difficulty of situations where a significant improvement is "inextricably intertwined" with the underlying material, thus precluding copyright and limiting the contribution.186 Lemley concludes, therefore, that copyright law provides insufficient encouragement for significant improvements and effectively "allow[s] the original copyright owner to capture the value of . . . significant improvements made by others."187 Significantly, many jazz arrangements fall into this category.188

Radical improvers make a major contribution to an original work such that the additional material "predominates over infringing material."189 Without permission for use, radical improvers under copyright law could still infringe the material utilized from the original work, regardless of the value added.190 Lemley claims that to determine whether an improvement is radical, a court should "not compare it to the whole of

182. Id. at 1019.
183. Id. at 1020.
184. Id.; see also supra Part I.A.2.
185. Lemley, supra note 30, at 1020.
186. See id. at 1022 (suggesting that Section 103 of the 1976 Copyright Act does not provide sufficient protection for an improver's contributions unless the improver's contribution is not "easily separated" from the original material). Section 103 allows for copyrighting of the additions to an original work in derivative works, but the author of a derivative work can copyright only those portions separable from the original work. Id. at 1021-22. This certainly reflects a difficult situation in many jazz arrangements, as melodic, harmonic, and rhythmic elements can prove difficult to separate. See, e.g., supra notes 13-15 and accompanying text.
187. Lemley, supra note 30, at 1022-23.
188. See supra notes 13-15 and accompanying text.
189. Lemley, supra note 30, at 1023.
190. See id. at 1023-24 (citing as an example "[t]he composer who writes a song which is similar in only a few notes to a previously published song [is] subject to suit for copyright infringement notwithstanding the value of [his] contributions" (footnote omitted)).
the original work," but only to the portion it draws from, which would provide substantial protection to more creative arrangements.\footnote{191}{Id. at 1083. Lemley defines improvement as "the new material produced by the 'improver,'" not a "value judgment about the relative merit of the two copyrighted works." \textit{Id}.}

Lemley dismisses the current rule and instead suggests a rule parallel to the "blocking patents" doctrine that would protect "substantial improvers"—such as significant and radical improvers (but excluding minor improvers)—who contribute significantly to preexisting works.\footnote{192}{\textit{Id}. at 1074. The "blocking patents" doctrine not only prevents the improver from using the original patent's material without permission, but also prevents the original patent holder from using the improver's added material. \textit{Id}. at 1020-21.} Though it would not necessarily prevent infringement suits, this rule would enhance the bargaining power of substantial improvers against the creators of underlying works.\footnote{193}{\textit{Id}. at 1075 (providing two rationales for this theory). First, when improvers create valuable improvements, they would have more leverage to use against original creators who wish to profit from the improved work; and second, it reduces the potential for lawsuits by limiting the potential rewards for original creators. \textit{Id}. at 1075-77. Lemley also proposes a broad scope of protection for radical improvements based on the "transformative use" doctrine, suggesting that courts should allow "a use in circumstances where it adds a great deal of value" to an existing work in relation to the copied portion. \textit{Id}. at 1077-78.}

Lemley's proposed approach to derivative works takes into account factors that present difficulties for jazz arrangements.\footnote{194}{\textit{See id}. at 1074-77; \textit{supra} note 30 and accompanying text.} Because courts exact only one minimum threshold for an arrangement to qualify as a copyrightable derivative work, the various levels of creativity existing in jazz arrangements do not receive appropriate legal recognition.\footnote{195}{\textit{See supra} Part I.A.} An adjustment in the law to recognize different categories of derivative works and musical arrangements would undeniably represent an improvement.

III. ESTABLISHING A LEGAL FRAMEWORK FOR EVALUATING JAZZ ARRANGEMENTS

A. Woods v. Bourne Co.: An Appropriate Threshold for Minimum Originality in Musical Arrangements

To effectively address whether arrangements contain sufficient originality, courts should adopt a standard that incorporates the factors announced by the Second Circuit in \textit{Woods v. Bourne Co}.\footnote{196}{60 F.3d 978, 991 (2d Cir. 1995). The court adopted the district court's proposal and provided a more defined framework of relevant factors and nonqualifying contributions that courts should evaluate when looking to originality in musical} By looking

\begin{quote}
191. \textit{Id}. at 1083. Lemley defines improvement as "the new material produced by the 'improver,'" not a "value judgment about the relative merit of the two copyrighted works." \textit{Id}. \\
192. \textit{Id}. at 1074. The "blocking patents" doctrine not only prevents the improver from using the original patent's material without permission, but also prevents the original patent holder from using the improver's added material. \textit{Id}. at 1020-21. \\
193. \textit{See id}. at 1075 (providing two rationales for this theory). First, when improvers create valuable improvements, they would have more leverage to use against original creators who wish to profit from the improved work; and second, it reduces the potential for lawsuits by limiting the potential rewards for original creators. \textit{Id}. at 1075-77. Lemley also proposes a broad scope of protection for radical improvements based on the "transformative use" doctrine, suggesting that courts should allow "a use in circumstances where it adds a great deal of value" to an existing work in relation to the copied portion. \textit{Id}. at 1077-78. \\
194. \textit{See id}. at 1074-77; \textit{supra} note 30 and accompanying text. \\
195. \textit{See supra} Part I.A. \\
196. 60 F.3d 978, 991 (2d Cir. 1995). The court adopted the district court's proposal and provided a more defined framework of relevant factors and nonqualifying contributions that courts should evaluate when looking to originality in musical
\end{quote}
to elements such as "unusual altered harmonies [and] novel sequential uses of themes," courts will find that most jazz arrangements possess sufficient originality to qualify as derivative works. Though courts may differ as to the standard to apply, all agree that at least some minimum standard of originality must exist for a musical arrangement to qualify as a copyrightable derivative work. While having a minimal threshold makes sense, copyright law stops there, failing to account for the fact that jazz arrangements can vary greatly in originality and in their use of underlying works. The single threshold standard does not provide a suitable framework for copyrighting derivative works. A better scheme would allow for different amounts of protection to account for varying degrees of creativity and originality evinced in those works.

B. Assessing Substantial Similarity in Jazz Arrangements

Due to the shortcomings of a single threshold approach, trouble could arise in the event that an arranger deems her arrangement of such considerable originality that she obtains a copyright for it as an original, not derivative, work. Because arrangers can dramatically alter an underlying work in numerous ways, courts would have to examine all elements of the arrangement as a whole to determine whether substantial similarity exists. Additionally, because arrangers sometimes incorporate small portions of previous works into their arrangements,

arrangements. See id. Though the court did not explicitly present a minimum requirement for sufficient originality in a copyrighted arrangement, it implied that a musical arrangement must meet a certain standard in order to qualify for a copyright as a derivative work. See id.

198. See supra Part I.A.
199. See supra notes 10-12 and accompanying text.
200. See Email from Fred Sturm, supra note 17.
201. See supra notes 13-15 and accompanying text. As at least one court has recognized, music in the jazz idiom often involves more creative musical ideas than those recognized as traditional or popular. See Tempo Music, Inc. v. Famous Music Corp., 838 F. Supp. 162, 168 (S.D.N.Y. 1993) ("[I]n contemporary music, and particularly in the jazz music genre, musicians frequently move beyond traditional rules to create a range of dissonant and innovative sounds."). While the melody often presents the most obvious starting point for analysis, not all courts have so constrained their examinations. See, e.g., id. at 169 ("[H]armony can, as a matter of law, be the subject of copyright."). By evaluating elements other than the melody, such as harmony, courts could develop a framework by which to resolve infringement disputes involving jazz arrangements.
202. See, e.g., STURM, supra note 4, at 15, 20 (describing how arranger Bob Brookmeyer took several short melodic cells from Jelly "Roll" Morton's "King Porter Stomp," and manipulated them into entirely new sequences to create a melodic structure and "concluding gesture to his work"). Jazz arrangers often make use of significant
courts should follow the approach in *Newton* that tests both the quantitative and qualitative importance of the segment.\(^2\)\(^0\)\(^3\)

C. An Expanded Approach to Derivative Works: Accounting for Improvements in Copyright Law

Copyright law could more effectively solve the aforementioned problem and eliminate the potential of infringement lawsuits by adjusting the derivative works doctrine. Two critical problems plague the copyrighting of jazz arrangements: the difficulty that can arise in differentiating certain derivative works from their underlying works,\(^2\)\(^0\)\(^4\) and the inevitable intertwining of derivative works and their underlying works.\(^2\)\(^0\)\(^5\) The former can give rise to infringement suits, and the latter can reduce the amount of copyright protection available to a derivative work.\(^2\)\(^0\)\(^6\) Creative jazz arrangements provide examples of both problems.

A clearer approach to copyright improvements would provide the best opportunity for jazz arrangers to reap the rewards of their labor while protecting the rights of composers of underlying original works.\(^2\)\(^0\)\(^7\) Under an expanded improvements doctrine framework, treatment of derivative works can advance beyond copyright law's single-threshold system of certifying musical arrangements and allow for greater ownership and protection.


203. *See* Newton v. Diamond, 388 F.3d 1189, 1195 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 2905 (2005) ("Substantiality is measured by considering the qualitative and quantitative significance of the copied portion in relation to the plaintiff's work as a whole."). As the court stated in *Baxter v. MCA, Inc.*, despite the short length of a copied portion, if qualitatively important, it can still lead to a finding of substantial similarity. *See* Baxter v. MCA, Inc., 812 F.2d 421, 425 (9th Cir. 1987).

204. *See* Goldstein, *supra* note 172, at 217; *see also* STURM, *supra* note 4, at 26-27 (describing Bill Holman's 1994 arrangement of “Chant of the Weed,” in which the Holman's melodic and rhythmic additions effectively "blurr[ed] the boundaries between the original composition and the arrangement").


206. *See* Goldstein, *supra* note 172, at 218 ("Having determined that a derivative right is in issue, it is far more difficult and consequential to draw the line that separates infringing from non-infringing derivative uses.").

207. *See supra* notes 180-93 and accompanying text.
Many arrangers take original works and extensively revitalize those works.208 These arrangements would qualify as significant or radical improvements depending on their originality.209 Because the resulting value of those arrangements rests largely in the hands of the arranger, it hardly seems reasonable for the law to apportion strong ownership rights to the underlying work if a subsequent derivative work proves vastly more expansive.210 Moreover, expanding the scope of derivative works protection would actually serve to protect the rights of underlying composers insofar as it would encourage arrangers to copyright their works as derivative works, and not independent original works.211

By implementing a “blocking copyrights” doctrine for creative derivative works, copyright law would strengthen arrangers’ bargaining power. This more flexible doctrine would provide greater protection for jazz arrangers while allowing composers of underlying works to retain appropriate rights in the arrangement.212

D. An Expert-Driven “Intended Audience” Test: One in the Same for this Field

To determine the copyright issues surrounding jazz arrangements, courts should apply the “intended audience” test, as formulated in Dawson.214 Dawson addressed the quandary presented by courts’ interpretations of Arnstein.215 The “intended audience” standard

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208. See Email from Fred Sturm, supra note 17.
209. See supra notes 185-93 and accompanying text.
210. See Ronald P. Smith, Note, Arrangements and Editions of Public Domain Music: Originality in a Finite System, 34 CASE W. RES. L. REV. 104, 139 (1983) (“Courts should tailor the scope of protection to the extent of a work’s originality.”). For an extreme example, “hummers,” who often have little to no technical music skills, linger on movie sets and hum melodies to a composer or arranger, hoping that the composer or arranger might eventually develop one of their themes into an extensive movie orchestration. Email from Fred Sturm, supra note 17; see also Eddie Glenn, Film Composer Shares His Experience, SAPULPA DAILY HERALD (Sapulpa, Okla.), Oct. 14, 2005, http://www.sapulpadailyherald.com/statenews/cnhinsall_story_287085420.html (reversing “hummers” on movie sets).
211. See supra notes 185-91 and accompanying text (recognizing the need to evaluate not only new contributions in derivative works, but also what was utilized from underlying works).
212. See Lemley, supra note 30, at 1075-77.
213. See Smith, supra note 210, at 139. Smith’s goal of equating protection to originality proves analogous to the goal of preserving public domain music, while also recognizing the originality of composers who develop arrangements built from those public domain works. See id. at 141.
215. See E. Scott Fruehwald, Copyright Infringement of Musical Compositions: A Systematic Approach, 26 AKRON L. REV. 15, 27 (1992) (“[T]hose courts that employ the ordinary listener test to establish copying ignore that the ordinary listener is ill-equipped
provides a sensible alternative to the “lay listener” standard for courts to utilize and may serve to better protect composers.\textsuperscript{216} Because the audience for jazz arrangements generally consists of those interested in that particular art and not the average listener,\textsuperscript{217} no justification exists for exacting the lesser standard when dealing with complex art forms.\textsuperscript{218} Thus, a lay listener standard would prove woefully inadequate, given that many lay listeners would have no experience with such jazz works.\textsuperscript{219}

\textsuperscript{216} See Baxa & Krasilovsky, supra note 158, at 101. An audience test proves superior to an average lay observer standard because of “the intimate link between the determination of substantial similarity and the basic economic philosophy underlying copyright law.” Michael Ferdinand Sitzer, Note, Copyright Infringement Actions: The Proper Role for Audience Reactions in Determining Substantial Similarity, 54 S. CAL. L. REV. 385, 416 (1981). Sitzer cautions, however, that “[c]ourts applying the audience test on the issue of substantial similarity should take care to isolate the appropriate audience,” because a plaintiff’s audience can cover a different market than a defendant’s audience. Id. at 415-16.

\textsuperscript{217} Though not all situations present difficult questions of similarity, music’s increasingly broad landscape lessens the chances that the lay public will always constitute the intended audience of a work. Cf. Grinvalsky, supra note 33, at 423.

\textsuperscript{218} See id. Grinvalsky states that:

\begin{quote}
[an unintended audience may find that . . . two works sound substantially alike where an intended audience may find the two works fall short of substantial similarity. Where the styles are similar, for example, an unintended audience creates a risk of a lower substantial similarity plane. On the other hand, where the styles are different, the risk shifts in the other direction. The result may be a finding of no infringement where there perhaps should be, where the unintended audience simply could not believe that the works contained similarity of expression because, based on a mechanical change of tempo or instrumentation, the works did not sound alike. Of course, this skewing will not always occur. But having an unaided, uninformed, disinterested or distanced finder of fact creates a potential risk of error that should not be there.]
\end{quote}

\textit{Id.} Additionally, Michael Sitzer claims that “if the courts begin to question the true rationale behind the use of spectator reactions, they will discover that the average lay observer test is obsolete when dealing with works aimed at a distinguishable audience group.” Sitzer, supra note 216, at 415 (footnote omitted); see also J. Michael Keyes, Musical Musings: The Case for Rethinking Music Copyright Protection, 10 MICH. TELECOMM. & TECH. L. REV. 407, 440 (2004) (“Music is not composed in a vacuum, and it certainly is not composed for the ears of a hypothetical reasonable listener.” (footnote omitted)). In fact, jazz arranging provides a perfect example of the reason for the Dawson court’s standard. In Dawson, a spiritual arranger created work within a specialized niche for those who held a special interest in that genre. Baxa & Krasilovsky, supra note 158, at 91-92. Therefore, it seems most probable that if confronted with a similar complex and unique musical art form such as jazz arrangements, the court would have applied the same standard.

\textsuperscript{219} See Baxa & Krasilovsky, supra note 158, at 100 (arguing that analysis by an “ordinary lay person” should not apply “to sophisticated works such as choral sheet music”); Alice J. Kim, Comment, Expert Testimony and Substantial Similarity. Facing the
Likewise, when dealing with complex music copyright claims, courts should always utilize expert testimony for, in the case of jazz arrangements, the intended audience often consists of many who courts would consider experts. It therefore makes sense to require courts to "consider opinion testimony from qualified witnesses having specialized knowledge of the field to assist the trier of fact in order to understand the works and the likely reaction of the intended audience." Arnstein established that courts may examine expert testimony when necessary to assist fact-finders; by this logic, expert testimony would likely prove relevant to infringement claims involving complex works. Expert testimony can assist a court in evaluating jazz arrangements under the intended audience standard; consequently, lessening the burden on the court to render a decision based on its own knowledge.

An expert-driven intended audience standard would serve to protect both jazz arrangers and composers of original works. The standard would protect the rights of original composers by helping to identify

Music in (Music) Copyright Infringement Cases, 19 Colum.-Vla J.L. & Arts 109, 127 (1995) (noting that "judges and juries are rarely musically educated and are less sensitive to the intricacies involved in musical creativity," and emphasizing "the complexity of music and the general public's unfamiliarity with the many technical aspects of music" (quoting Debra Presti Brent, The Successful Music Copyright Infringement Suit: The Impossible Dream, 7 U. Miami Ent. & Sports L. Rev. 229, 246 (1990)).

220. See Smith, supra note 210, at 139 ("The use of experts is essential to achieving an informed analysis in an infringement suit . . . . Their judgment of the substantiality of similarity between two arrangements can have a great impact on the ultimate success of a particular arrangement . . . .")

221. Cf. Baxa & Krasilovsky, supra note 158, at 100 (discussing the same idea in relation to choral arrangements, that "[t]he intended audience for such a choral piece is not the listening audience, nor even the average member of a chorus which might sing the work; but rather, a choral director, teacher or other trained professional in the field").

222. Id. Additionally, even in less complex jazz arrangements, the necessity to parse through a score containing multiple parts and systems of musical organization requires musical training. Cf. id. (asserting that this is true in complex choral arrangements).


224. Baxa & Krasilovsky, supra note 158, at 100. Paul Grinvalsky describes the problem as "a judge, sitting at bar, holding two pieces of sheet music, simply could not understand their language, and so was incapable of detecting, much less appreciating, their similarity or dissimilarity." Grinvalsky, supra note 33, at 428. Grinvalsky also referred to Dawson v. Hinshaw Music, Inc. and the fact that the judge was not "the audience for whom such . . . music [was] composed." Id. (alterations in original); see also Keyes, supra note 218, at 441 ("[It does not] make sense for music copyright infringement to turn on the ultimate reaction of a hypothetical listener whose auditory predilections are not at all clear or even objectively defined."). For an even more expansive view of the role of experts in music copyright infringement cases, see Smith, supra note 210, at 140-41 (discussing the possibility of an expert jury of knowledgeable musicians, whose "familiarity with musical terminology and knowledge of the novelty and sophistication of various musical techniques can [provide] well-reasoned, competent decisions").

225. See supra notes 216-24 and accompanying text.
when extensively altered works infringe their compositions, and it would allow for courts to better identify when works constitute significant and radical improvements. 226

IV. CONCLUSION

Copyright law should promote, not inhibit, creativity in the arts. By limiting incentives to create complex arrangements and, in some cases denying privileges to elaborations on existing works, copyright law provides insufficient protection for jazz arrangers. Courts should adopt a derivative works scheme that accounts for the various levels of improvements within copyright law. Expert testimony should provide the basis for an "intended audience" standard that would best assist courts in assessing originality in jazz arrangements. As a result, composers of original works would retain rights in their works while allowing jazz arrangers to develop new ideas freely based on those underlying works thus, enriching the landscape of music.

226. See supra notes 222-24 and accompanying text.