Arrangements and Editions of Public Domain Music: Originally in a Finite System

Ronald P. Smith

Follow this and additional works at: https://scholarlycommons.law.case.edu/caselrev

Part of the Law Commons

Recommended Citation
Available at: https://scholarlycommons.law.case.edu/caselrev/vol34/iss1/6

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.
ARRANGEMENTS AND EDITIONS OF PUBLIC DOMAIN MUSIC: ORIGINALITY IN A FINITE SYSTEM*

Copyright law seeks to protect originality; in the context of derivative music, however, courts have struggled to define originality. Hampered by unfamiliarity with musical terminology and basic compositional techniques, courts have groped for standards of easy application. But originality is not amenable to bright line standards. Indeed, stark distinctions between originality and nonoriginality are neither feasible nor responsible. This Note critiques existing judicial standards for assessing the originality of derivative works and offers suggestions for a more flexible allocation of copyright protection. It identifies the conflicting goals of copyright law—protecting a composer's originality while preserving the availability of public domain music and ideas—and demonstrates how those goals may be reconciled. Finally, the Note explores the benefits and limitations of expert testimony in musical copyright litigation, and shows how experts, without usurping the judicial function, can assist courts in reaching more sophisticated decisions.

INTRODUCTION

MUSIC IS A FINITE SYSTEM, capable of infinite permutations. Its twelve tones\(^1\) are juxtaposed and placed in succession by the composer to convey an emotional and artistic intent. Copyright law seeks to determine whether a certain combination of tones is "original" within this finite system. Derivative works involve a more difficult question: To what extent is the derivation original?

The problem in discussing musical copyright is that music is sound, which cannot be verbally broken down and described.\(^2\) The words developed in musical analysis are merely attempts to describe why a piece might work, and what some trained ears

---
* First prize, Nathan Burkan Memorial Competition, Case Western Reserve University School of Law (sponsored by the American Society of Composers, Authors, and Publishers (ASCAP)).

1. Traditional western music consists of twelve chromatic tones: c, c\(_\#\), d, d\(_\#\), e, f, f\(_\#\), g, g\(_\#\), a, a\(_\#\), and b. Since a piece may go on for an indefinite period of time, there are an infinite number of arrangements of these tones.

2. Although initially I was uncertain whether to include musical excerpts in footnotes, I came to realize that by neglecting to do so I would be as remiss as the courts I criticize for failing to present the musical material at issue. To those who do not read music, I extend sincere apologies for any difficulties encountered with the excerpts. Most of the pieces cited are readily accessible in a record library.
might hear when they listen to a piece. Thus, the gray area between language and musical sound is both the context and the cause of the problems discussed herein.

This Note addresses the failure of courts to provide a logical relationship between musical analysis and legal analysis regarding the originality of derivative works in the public domain. The Note first examines the evolution of statutory and judicial methods of assessing originality, and discusses their virtues and inadequacies. It then critiques the standards courts have used for extending copyright protection to works in the public domain. Finally, the Note explores the benefits and limitations of expert testimony in musical copyright litigation, and offers suggestions for reconciling legal and musical analysis of originality.

I. STATUTORY APPROACHES TO COPYRIGHTABILITY OF DERIVATIVE WORKS

A. Early English Statutes

The earliest copyright statute, the Statute of Anne, was passed in 1710. It totally neglected the subject of music, leaving

---

3. When, after that first evening at the Verdurins', he had had the little phrase played over to him again, and had sought to disentangle from his confused impressions how it was that, like a perfume or a caress, it swept over and enveloped him, he had observed that it was to the closeness of the intervals between the five notes which composed it and to the constant repetition of two of them that was due that impression of a frigid and withdrawn sweetness; but in reality he knew that he was basing this conclusion not upon the phrase itself, but merely upon certain equivalents, substituted (for his mind's convenience) for the mysterious entity of which he had become aware . . . .


4. In Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901), Justice Story offered an insight into the judiciary's discomfort with the subtle distinctions of copyright law. In copyright, he said, a judge is faced with one of those intricate and embarrassing questions, arising in the administration of civil justice, in which it is not, from the peculiar nature and character of the controversy, easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases. Patents and copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and sometimes, almost evanescent.

5. See infra notes 10–26 and accompanying text.

6. See infra notes 27–122 and accompanying text.

7. See infra notes 123–74 and accompanying text.

8. See infra notes 175–99 and accompanying text.


10. 1710, 8 Anne, ch. 19.

11. This statute was described as one "of the most laboriously considered acts that ever passed the legislature" of England. D'Almaine v. Boosey, 160 Eng. Rep. 117, 122 (Ex.
a void that was not to be filled until the Victoria Statutes in 1842.12 While the Victoria Statutes did protect original compositions, courts were unwilling to extend such protection to derivative works of public domain music. They reasoned that while an original work requires "genius for its construction, . . . a mere mechanic in music can make the adaptation or accompaniment."13

A rigid distinction between original and derivative works persisted throughout the nineteenth century. Its harshness is exemplified by *Carte v. Duff*,14 in which Gilbert and Sullivan's "Mikado" was lost to the public domain in the United States. The British authors, seeking copyright protection in America, engaged an American musician to come to London and prepare a piano arrangement from the original score.15 The musician, George Tracey, returned to the United States and copyrighted the arrangement as his own original work.16 An impresario pirated Tracey's arrangement and attempted to stage the opera in New York City.17 When Tracey sought to enforce his copyright, the court denied him protection. It asserted that an arrangement cannot be an original work; that an arranger "originates nothing, composes no new notes or melodies, and simply culls the notes representing the melodies and their accompaniments . . . ."18 Thus, Tracey's arrangement was an uncopyrightable derivative work, and the impresario was free to use it.19

B. 1909 Copyright Act

Copyright protection in the United States was finally extended to derivative works by the Copyright Act of 1909.20 The new stat-

---

1835). For the court to praise such a statute as well thought out may indicate an instinctive reluctance to give music, let alone derivative music, much protection.

12. 1842, 5 & 6 Vict., ch. 45, § 2. Case law had determined much earlier, however, that the statute was applicable to music. The case that declared this right to copyright was brought by Johann Christian Bach (son of Johann Sebastian Bach). See Bach v. Longman, 98 Eng. Rep. 1274 (K.B. 1777).


15. Id. at 183.

16. Id.

17. Id. at 184.

18. Id. at 185.

19. Id. at 187.


That compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain, or of copyrighted
ute was silent, however, regarding the extent of this protection. Copyright could be obtained for derivations of public domain material or, with the author’s permission, of copyrighted material—and such derivations would be deemed new works under the statute.\(^{21}\) It remained unclear, however, whether these “new works” were copyrightable in their entirety or only to the extent that they modified the borrowed material.\(^{22}\)

C. 1976 Copyright Act

After decades of judicial uncertainty,\(^{23}\) the Copyright Act of 1976\(^{24}\) made clear that derivative works are copyrightable only to the extent that they modify the preexisting material.\(^{25}\) Copyright protection extends only to “the material added by the later author, and has no effect . . . on the copyright or public domain status of the preexisting material.”\(^{26}\)

While the 1976 Act protects any original contribution that an arranger brings to an existing piece, the statute fails to specify minimum standards for gauging the originality of that contribution. It was left to the courts to formulate guidelines for the requisite degree of originality a derivative work must possess to warrant copyright protection. In both the formulation and appli-

---

\(^{21}\) Id., ch. 320, § 6, 35 Stat. 1075, 1077.

\(^{22}\) By referring to derivative works as “new works,” the statute created the impression that derivations were copyrightable in their entirety. The drafters meant to say that a derivative work is copyrightable only to the extent that it modifies the original work. But they expressed this idea negatively, stating that the copyright or public domain status of an original work would not be affected by the protection afforded derivative works. See supra note 20. By failing to express in specific, affirmative terms the degree of copyright protection to be afforded derivative works, the drafters created needless and lasting confusion.


cation of these guidelines, courts have been hampered by an ignorance of basic musical terms and an unfamiliarity with the music industry.

II. JUDICIAL GUIDELINES FOR ORIGINALITY

A. The Mere Mechanic Test

American courts initially took a dim view of arrangements of public domain music. In the seminal case of *Jollie v. Jacques*, two different arrangements of a folksong were deemed uncopyrightable because both were derived from a public domain melody. Employing the English rule governing the adaptation of airs, the court decided that since a "mere mechanic" could perform these arrangements, they exhibited insufficient originality to warrant copyright protection. While the mere mechanic standard persisted in the United States, it was specifically rejected in England thirteen years after *Jollie*. In *Wood v. Boosey*, the court held that a piano arrangement of an opera was an independent musical composition worthy of copyright protection. It declared that, in adapting a work to a particular instrument, arrangements

27. 13 F. Cas. 910 (C.C.S.D.N.Y. 1850) (No. 7437).
29. *Id.* On the quantum of artistry needed to compose a variation on public domain folk melodies, the following observations have been offered:

Many people think it a comparatively easy task to write a composition round folk-tunes. A lesser achievement at least than a composition on "original" themes. Because, they think, the composer has dispensed with part of the work: the invention of themes.

This way of thought is completely erroneous. To handle folk-tunes is one of the most difficult tasks; equally difficult if not more so than to write a major original composition. If we keep in mind that borrowing a tune means being bound by its individual peculiarity we shall understand one part of the difficulty. Another is created by the special character of a folk-tune. We must penetrate into it, feel it, and bring it out in sharp contours by the appropriate setting. The composition round a folk-tune must be done in a "propitious hour" or—as is generally said—it must be a work of inspiration just as much as any other composition.


The master who has the skill to develop a great musical work certainly possesses the ability to evolve melodies. When he takes a folk-theme as the subject of one of his master works, it is for the purpose of elaborating and beautifying it as a lapidary might take an unpolished diamond, and by his skill bring out the scintillating and kaleidoscopic beauties of the stone. After all, the handling of the theme is even more significant than the evolution of the theme.


30. 3 L.R.-Q.B. 223 (1868).
31. *Id.* at 230.
entail "invention" amounting to "composition."32

Nevertheless, American courts continued to apply the standard. Harmonization of preexisting works was considered a purely mechanical skill, unworthy of copyright protection.33 Likewise, an arrangement using a simple "staccato beat" to harmonize a preexisting melody was deemed to require only mechanical skill, and hence was denied protection.34 Even literary endeavors were affected by the mere mechanic test. In "Grove

32. Id. at 232–33. After rejecting the mere mechanic standard, id. at 229–30, the court emphasized the skill and judgment required in arranging. Id. at 231–32. Ironically, the court refused to enforce the copyright because the composer of the original opera—not the arranger himself—had been registered as the author of the arrangement. Id. at 230–31.

33. Cooper v. James, 213 F. 871, 872–73 (N.D. Ga. 1914). In Cooper, an alto line was added to the public domain works "Nearer My God to Thee," "The Promised Land," and "Coronation." The court described these alto lines as "mere improvements." Id. at 873. Could it not have granted protection to the extent of these improvements? Many chorales are based on plainsong or folk tunes. Through the originality of many gifted composers, the individuality of these arrangements gave rise to the different church liturgies. See 4 NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 314 (S. Sadie ed. 1980). As for the proposition that harmonizations are "mere improvements," see the following two examples with a change in the alto line. In the first example (by J.S. Bach) the alto line is fluid and completes the harmonies. The alto line in the second example (by Ronald P. Smith) is awkward and fails to fill in the center:

J.S. Bach, Chorale, "O Haupt voll Blut und Wunden," from St. Matthew Passion, Part II, BWV 244 (c. 1727).

34. Shapiro, Bernstein & Co. v. Miracle Record Co., 91 F. Supp. 473, 474 (N.D. Ill. 1950). The term "staccato beat" was used incorrectly by the Shapiro court. Staccato is an articulation—the length and accent of the note—whereas beat is the regular procession of the pulse of a piece. If the court meant a staccato rhythm, it could have meant either

(a): \( \uparrow \uparrow \uparrow \uparrow \uparrow \mid \uparrow \uparrow \)

or

(b): \( \uparrow \xi \uparrow \xi \mid \xi \xi \xi \xi \)

The court was probably referring to a simple staccato rhythm, as exemplified by (b). Its
Press, Inc. v. Collectors Publishers, Inc., an editor made 40,000 changes in grammar, syntax, and word choice in a public domain biography. When another publisher photocopied this work for publication of his own edition, the editor brought suit to enjoin publication. Describing the editorial changes as work that any "high school English student" could do, the court denied the injunction.

The inadequacy of the mere mechanic test stems partly from its preoccupation with the individual elements of a piece—its failure to examine the musical work as a whole. In Smith v. George E. Muehlebach Brewing Co., the words "Tic Toc, Tic Toc, Time for Muehlebach" were set to the rhythm of a ticking clock in a simple two-note, c-g pattern. The court found that the individual elements of the piece were too "common" to warrant protection, and therefore denied copyright to the composition as a whole. Although this jingle is admittedly not an inspiring work of art, the court could have granted copyright to the specific expression created by the combination of these elements. Focusing on the work as a whole, the court could have extended limited protection to the "song" itself, proscribing only a direct copy. Instead, the court applied a standard "mechanical" test to a system it clearly did not reference to "staccato" was irrelevant, since articulation has no impact on harmony. Thus, even the most basic "mechanical" terms were misunderstood by this court.

An opposite result was reached in Fred Fisher, Inc. v. Dillingham, 298 F. 145 (S.D.N.Y. 1924). There, staccato and legato versions of an ostinato (an ostinato is a repeating line, usually present in the bass, 14 New Grove Dictionary of Music and Musicians 11 (S. Sadie 5th ed. 1980)) were held to be similar. The court therefore found an infringement even though both ostinatos consisted of little more than do-re-mi:

(The top line is defendant's ostinato; the bottom line is plaintiff's.) Since do-re-mi are the first three notes of any major scale, the Fred Fisher court effectively granted copyright protection to a basic building block of western music. One wonders whether this court truly understood what was before it. Music from Sherman, Musical Copyright Infringement: The Requirement of Substantiality, 22 Copyright L. Symp. (ASCAP) 84, 107 (1977).

36. Id. at 605.
38. Id. at 730.
39. Id. at 730-32.
40. Id. at 731.
understand.41

Courts utilizing the mere mechanic standard determine copyrightability not by looking at the originality of an expression, but at the level of musicianship required to communicate it. In McIntyre v. Double-A-Music Corp.,42 the court denied copyright protection to an arrangement of a Bing Crosby song because it viewed the arrangement as "melodic and harmonic embellishments" that "are frequently improvised by any competent musician."43 But, are embellishments frequently improvised by all competent musicians? Would not a competent classical pianist be less capable of improvising these embellishments than a jazz pianist? Would a competent pianist have the same capacity to fill in a

41. The court evinced its lack of understanding by misusing musical terminology. This is not to imply that the court reached an untenable result in finding the two-note pattern uncopyrightable. It does demonstrate, however, that the court was not sufficiently familiar with music to administer a "mechanical skills" test with consistency or discrimination.

In laying out the facts, the court first stated that the lyrics were set to "'C' and 'g' in the musical key of 'C.'" Id. at 730. Subsequently, however, the court spoke of "two notes in a common musical scale," id., and "two notes in the commonest scale of music," id. at 731. Thus, the court used "scale" and "key" interchangeably. This is incorrect. A scale is a set pattern of notes; a key is a general feeling of focus in reference to internal musical relationships. A key may be defined while omitting notes from its complementary scale or by reference to notes outside its scale. It consists of two elements: tonal center (the reference point to which tensions in the key resolve), and mode (e.g., major, minor, blues, phrygian). A scale, on the other hand, is a progression of wholesteps and halfsteps beginning on a note and ending an octave (eight notes) higher. A C major scale, for example, is: c-d-e-f-g-a-b-c.

Had the court enjoyed a familiarity with music, it would have recognized the inaccuracy of using these terms interchangeably. Moreover, its use of the word "common"—whether meant to describe key or scale—makes little sense musically. With only two notes as a reference point, it is impossible to discern which key the work at issue was in. It might be a "common" major or minor key, or a more unusual mode: harmonic minor, phrygian, even a pentatonic system.

Ultimately, though, the Muehlebach court's emphasis on scale or key was irrelevant, since originality—the sole concern of copyright—does not depend on the scale or key of a work. What was "common" about the work before the court was not its scale or key, but the relationship between the two notes. The c-g relationship is termed a fifth (because there is a five-note interval from c to g: c-d-e-f-g). This interval is the second most natural relationship in music (after c-c), and occurs in almost all traditional western and eastern scales. C. ROSEN, THE CLASSICAL STYLE 23 (1973). The tonic-dominant relationship of c-g is the basic tension-resolution relationship in music. Thus, the Muehlebach court reached the correct result for the wrong reason. It should have denied copyright not because plaintiff sought protection for two notes of a "common" scale, but because the plaintiff sought protection for a basic building block of the musical language.

43. Id. at 683.
figured bass as a competent harpsichordist?  

These are questions which must be addressed by a test that focuses more on competence than originality. Yet it is originality, not competence, that copyright law seeks to protect. Moreover, it is questionable whether courts are competent to administer a musical competence test.

Another problem with the mere mechanic test is that it inherently favors the ornate over the simple—a problem common to much of copyright. When a simple harmonic chord was utilized in *Shapiro, Bernstein & Co. v. Miracle Record Co.*, the court deemed it a “mechanical application” insufficiently complex to warrant protection. Would the application of Wagnerian chromatic harmonies to a Mozart song be less mechanical and therefore more worthy of copyright than a simple stylistic chord progression? With derivative works, the issue is not only one of

44. Example (a) is the original figured bass by J.S. Bach. Example (b) is a realization of the figured bass by Lawrence Hampton:

```
(a):

(b):

J.S. Bach, Cantata, “Wachet auf, ruft uns die Stimme,” BWV 140, *Choral Fantasia*, meas. 103-07 (1731). The original would merely have included a simple bass line with numbers. The other notes would then be filled in by the performer. While accomplished pianists often purchase a realization, many harpsichordists fill in the bass while sightreading the work.


46. A lack of competence may be inferred from the courts’ misuse of musical terminology. See supra notes 34 & 41.

47. 91 F. Supp. 473 (N.D. Ill. 1950).

48. Id. at 474-75.

49. What follows is the application of a more complex harmony by Ronald P. Smith.
taste—society has an interest in preserving a composer's style and intent.\(^5\)

Ultimately, the mere mechanic test is almost impossible to apply because music by its very nature employs a great deal of mechanics in giving voice to the imagination. This is especially true in the area of form. Sonata-allegro,\(^5\)\(^1\) rondo,\(^5\)\(^2\) and scherzo\(^5\)\(^3\) forms lay broad mechanical outlines of large sections of music. A step-wise progression of rules governs the composition of inventions in the style of J.S. Bach.\(^5\)\(^4\) Species counterpoint is a set of rules governing the compositional style of the Renaissance.\(^5\)\(^5\) Serialism\(^5\)\(^6\) is a compositional method in which a fixed series of tones governs the placement of the notes. These systems set up mechanical rules for expanding smaller fragments of music into larger pieces. While the first two systems can be distinguished as "only"

to a melody by Mozart. Is the result more deserving of protection than the original? The dissonance and chromaticism of the harmony are very much out of place compared to the simple, elegant melody:

Top line from W.A. Mozart, Sonata in C Major, K. 545, Mvt. I, meas. 1–4 (1788).


51. Sonata-allegro in its simplest form consists of the exposition in the tonic, development in the dominant, with recapitulation of the original material in the tonic. The tonic is the tonal center of a key. For instance, in the key of C Major, c is the tonic and g is the dominant. C. ROSEN, supra note 41, at 30.

52. Rondo form consists of a main theme which recurs between subsidiary sections and returns to conclude the composition (ABAC . . . A) (letters represent thematic material). 16 NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 172 (S. Sadie 5th ed. 1980).

53. Scherzo form is generally A, A, BA, BA, C, C, DC, DC, A, BA. It usually occurs in 3/4 time. Id. at 634.

54. An invention in the style of J.S. Bach can be written as follows: Take a melody, repeat it an octave lower in a second voice, introduce it again in an upper voice, sequence (i.e., repeat the same melodic fragment but up or down a set interval), then invert the melody, sequence in the other voice, and cadence. Then, use the theme and inversion in sequence and stretto. Finish by recapitulating the original material and cadence to the tonic.

55. Species counterpoint is a step-wise progression of rules for learning the compositional style of the High Renaissance.

56. Serialism is a method of composition in which a fixed permutation, or series, of elements is referential; i.e., the handling of those elements in the composition is governed, to some extent and in some manner, by the series. A twelve-tone series is most commonly used. This technique was developed by Arnold Schoenberg in the 1920's. 17 NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS 162 (S. Sadie 5th ed. 1980).
educational techniques for learning compositional styles, serialism and computer music raise doubts about the viability of the mere mechanic standard. Would application of the mechanical rules of serialism preclude copyright? Is the musician-turned-computer programmer capable of composing nonmechanical music? The mere mechanic test is unsuitable for older forms of music and is obsolete with regard to more modern, mathematical forms.

57. What follows is a composition by Michael Praetorius programmed for a computer performance by Isadore Schoen:


```rem
10 Rem Music Program
20 Open #1, 0, 1 "Vater"
30 Poke 36878, 15 Rem set volume of note
40 Input #1, note, delay
50 Poke 36874, note
60 For I = 1 to (delay * 1000): Next I Rem delay
70 Poke 36878, 0 Rem turn note off
80 If not EOF go to 30
90 Close #1: End
```

215 1
223 1 209 1 207 1
225 1.50 207 1 195 2
228 1 201 2 191 2
223 1 201 1 183 2
225 1 207 1
217 .5 201 1
225 .5 201 .5
215 .5 207 .25
215 .5 209 .25
207 .5 207 .5
209 1 219 2
215 1 209 1
215 2 225 1
215 1 215 1
207 1 201 1
209 1 195 1
215 1 201 1
```
B. Substantiality Test

1. Seminal Efforts

A more positive approach to musical derivative works was eventually adopted by various courts. This approach examined the differences between original and derivative works. Where the differences proved sufficiently substantial, the derivative work was deemed copyrightable as an independent composition. This substantiality test was first applied in *Wood v. Boosey*. The *Wood* court examined a piano arrangement of an opera. It found that the arrangement, while necessarily resembling the opera in many respects, contained substantial differences as well. By transcribing a score for many instruments into a piece for only the piano, the arrangement constituted a significant departure from the original, and was therefore worthy of protection as "a new and separate work."

American courts adopted the substantiality test as a most stringent standard. In *Hein v. Harris*, the court applied the substantiality test by means of a quantitative analysis to determine whether one song infringed the copyright of another. Finding that thirteen out of seventeen measures were "substantially the same in each song," the court deemed the defendant's song an infringement. Yet the court's finding of substantial similarity was based not on a detailed comparison of notes, but by listening to corresponding measures played in succession. Moreover, the court was predisposed to find such similarity: it described the popular style in question as having produced "numberless songs" of "a monotonous similarity," each bearing a "strong resemblance" to one another. While the court paid lip service to the notion that the musical merit of a work has no bearing on its copyrightability,

---

58. 3 L.R.-Q.B. 223, 229–30 (1868). Although first applied in *Wood*, the substantiality test was first articulated in dicta in *D'Almaine v. Boosey*, 160 Eng. Rep. 117, 123 (K.B. 1835) ("It must depend on whether the air taken is substantially the same with the original."). The *D'Almaine* court based its decision more on the mere mechanic test, *id.*; it neither developed nor applied the substantiality test.

59. 3 L.R.-Q.B. at 229.

60. *Id.*

61. *Id.* at 230.


63. *Id.* at 876.

64. *Id.*

65. *Id.*

66. *Id.* at 877.
its distaste for the style in question\textsuperscript{67} may have impaired its capacity to identify originality in the defendant's song. The style was the infamous ragtime.\textsuperscript{68}

2. Further Refinement: The "Distinctive Characteristic" Test

In refining the definition of substantiality, courts developed distinctions between "colorable attempts"\textsuperscript{69} at copying and "distinctive characteristic[s]"\textsuperscript{70} of originality. In \textit{Supreme Records, Inc. v. Decca Records, Inc.},\textsuperscript{71} the plaintiff recorded an arrangement of a popular song. This arrangement added an introduction, hand-clapping, choral responses, and further instrumentation to the original work.\textsuperscript{72} Using the plaintiff's ideas, the defendant created its own arrangement of the song, adding a more complex orchestration, fuller harmonization, a different ending, and other ideas.\textsuperscript{73} The plaintiff sued the defendant for appropriating its arrangement.\textsuperscript{74} The court stated that a musical arrangement is unworthy of copyright protection unless it has "a distinctive characteristic . . . of such character that any person hearing it played would become aware of the distinctiveness of the arrangement."\textsuperscript{75} The court asserted that the techniques employed in the plaintiff's arrangement were commonly used by arrangers,\textsuperscript{76} and that "[n]o claim of originality can be based on their use, singly or in combination."\textsuperscript{77} Thus, the plaintiff's arrangement was found unworthy of protection.

The substantiality test enunciated in \textit{Decca} is far more liberal than the test the court actually applied. At first glance, a "distinc-
tive characteristic” test would not seem especially strict. But the court’s application of that test—effectively denying copyright to any arrangement that applies, “singly or in combination,” common arranging techniques—is a test that requires the unorthodox. In this respect, the *Decca* standard is more stringent than the mere mechanic test; under the latter, at least, an arranger was rewarded for skill or complexity. But under *Decca*, an arranger must employ techniques not commonly used by his peers.

Once again, a court is focusing on the individual elements of a work when it should be examining the combination of those elements. The *Decca* court placed undue emphasis on the commonness of the arranging techniques. In assessing the distinctiveness of an arrangement, it is not which techniques an arranger uses but how he uses them that matters.\(^7\)

3. *Emphasis on Melodic Analysis*

Courts exhibit a great tendency in many copyright cases to focus solely on melody in assessing the originality of a work.\(^7\) Other musical elements, such as rhythm and harmony, have been ignored by courts as having negligible impact on originality.\(^8\) One court described rhythm as “tempo,”\(^8\) and harmony as simply “the blending of tones” for which rules have long been estab-

---

78. Ultimately, plaintiff may have lost by attempting to assert original, as opposed to derivative, copyright protection. It appears that plaintiff was not content to secure protection for the individual qualities of its arrangement; rather, it sued on an unfair competition theory, seeking both damages and an injunction against further distribution of defendant's arrangement. *Id.* at 906. The court found marked differences between the two arrangements, and rejected the unfair competition claim as groundless. *Id.* at 912–13. While its result was probably correct, the court displayed a preference for the ornate over the simple which may have colored its decision. It found plaintiff's recording “thin, mechanical, lacking in inspiration, containing just the usual accompaniments and the usual intonations which one would find in any common recording.” *Id.* at 912. The more complex orchestration and fuller harmonization of defendant's recording gave it a “full, meaty, polished” sound, *id.*, easily distinguishable from the plaintiff's arrangement. The reason these two arrangements were so distinguishable may be that they were in two different styles. From the court's description, plaintiff's work seemed to be in a bebop style, defendant's in a more romantic style (commonly dubbed “dentist's chair music”). In assessing the differences between the two arrangements, the court neglected to consider stylistic factors.


81. *Id.*
lished. The court baldly concluded that "[i]t is in the melody . . . that originality must be found."\textsuperscript{83}

The court clearly misunderstood these musical terms.\textsuperscript{84} Moreover, courts generally fail to grasp the interdependence of harmony, rhythm, and melody.\textsuperscript{85} Harmony often dictates the melodic options available to a composer,\textsuperscript{86} and the harmonic progression frequently defines the contours of the melody.\textsuperscript{87} This is especially true when an unaccompanied solo instrument or voice is

\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Rhythm is by no means synonymous with tempo. Tempo is overall pace—the fastness or slowness of a piece—whereas rhythm is the progression in time of a composition and the time relationship of one note to another note within the composition. For instance, the rhythm:

\begin{itemize}
  \item \( J \, J \, J \, J \, J \)
\end{itemize}

can be played in a slow or fast tempo.

Harmony is not simply a "blending of tones," nor have its rules been established for many years. It is one of the essential elements of a piece, lending structure, drive, and movement to the music. Harmony has continuously evolved over the centuries, and remains in a state of flux. The instant case was decided while Paul Hindemith, who helped establish a harmony built on fourths instead of traditional thirds, was still living. Thus, even as the court was describing it as settled, harmony was undergoing an extraordinary evolution. Even traditional harmonic "rules" are not rules so much as common usages. These usages set up small progressions and have numerous exceptions. It takes originality and creativity to invent larger progressions.

\textsuperscript{85} By stating that "neither rhythm nor harmony can in itself be the subject of copyright," 105 F. Supp. at 400, the court made clear its ignorance of the interrelationship of harmony, rhythm, and melody.

\textsuperscript{86} An inappropriate melody with harmony can give rise to dissonance. Below is a dissonant harmonization of a melody:

\begin{figure}
\centering
\includegraphics[width=\textwidth]{dissonant_harmonization.png}
\caption{Dissonant harmonization of a melody.}
\end{figure}

M. Mussorgsky, Promenade, Mvt. I, meas. 1–2, from \textit{Pictures at an Exhibition} (1874) (dissonant harmonization by Ronald P. Smith).

\textsuperscript{87} Bach's unaccompanied violin sonatas are an excellent example of this:

\begin{figure}
\centering
\includegraphics[width=\textwidth]{bach_sonata.png}
\caption{Bach's unaccompanied violin Sonata in B minor for unaccompanied violin, BWV 1002, Sarabande-Double, meas. 1–3 (1720).}
\end{figure}
used because the composer must *imply* the harmony through the melodic line. Rhythm adds greater definition to the melody and is capable of changing the whole character of a piece. If a rhythmic figure is well conceived, it can be the dominant element of a composition.

An important development occurred in *Desclee & Cie, S.A. v. Nemmers*, where the court recognized the significance of rhythm. The plaintiff had translated medieval plainsong neumes into modern rhythmic notation with the assistance of the Abbey of Solesmes. The defendant photocopied the plaintiff's work and the plaintiff brought suit, alleging unfair competition. While the court rejected the unfair competition claim, it stated

---

88. See id.
89. The Turkish March variation of the Choral Movement of Beethoven's Ninth Symphony is an excellent example of this.
Original statement of theme is a songlike melody:

L. von Beethoven, Symphony no. 9 in D Minor, op. 125, Mvt. IV, meas. 92–95 (1824) (transposed to B-Flat Major).

The fourth variation is a rhythmic variation, which adds brightness and charm to the original representation of the theme:

*Id.* at meas. 339–51 (piano reduction by Michael A. Walsh).

90. The motif of Beethoven's Fifth Symphony is as well-recognized for its rhythm of three short and one long notes as for its melodic content.
91. 190 F. Supp. 381 (E.D. Wis. 1961).
93. 190 F. Supp. at 383.
94. *Id.*
95. *Id.* at 386–89. Curiously, plaintiff did not sue on traditional copyright grounds. 
that the rhythmic notations were "an integral part of the piece" and, as such, were worthy of copyright protection. In recognizing rhythm as an "integral" part of the work, the court expanded the concept of substantiality. Although the decision has been criticized, it was a positive first step in recognizing that rhythmic, as well as melodic and harmonic, modifications can make a substantial contribution to the originality of a derivative work.

By focusing on the differences between original and derivative works rather than on the level of skill exercised by an arranger, the substantiality test represented progress over the mere mechanical test in analyzing the originality of derivative works. The test had limited value, however, since "substantiality" was susceptible to widely varying interpretations. Moreover, the test encouraged the instinctive tendency of courts to award copyright protection to ornate, rather than faithful, interpretations of an original. Finally, the test placed a myopic emphasis on melody as the sole source of a work's originality, largely ignoring the equally important elements of harmony and rhythm.

C. Trivial Variation Test

A much more lenient standard was first expounded in Marks v. Leo Feist, Inc. The case involved two pieces with basically the same melody. The plaintiff sued for copyright infringement, but the court decided that the different beat and accent of the second work precluded an infringement claim. The court adopted a standard that denied an infringement action so long as the sec-

96. 190 F. Supp. at 388.
97. See Note, supra note 95, at 135.
98. See supra note 78.
99. See supra notes 79-90 and accompanying text.
100. But see Deslée, 190 F. Supp. 381 (isolated exception). See supra notes 91-97 and accompanying text.
101. 290 F. Supp. 959 (2d Cir. 1923).
102. Id. at 959-60.
103. Id. at 960. Even though there were some rhythmic differences, the six measures that appear below would have the same basic effect:

Music from Sherman, supra note 34, at 128.
ond piece did not largely copy the first. While it is questionable whether this was the appropriate standard for an infringement suit brought by an original composer, the trivial variation test was viewed more favorably in later cases involving public domain works.

Much of the progress in developing this standard occurred in areas other than music. *Gelles-Widmer Co. v. Milton Bradley Co.* involved the photocopying of mathematical flash cards used for the teaching of basic math skills. The court found that while the numbers themselves were obviously in the public domain, their arrangement on the flash cards was a "distinguishable variation" warranting copyright protection. *Donald v. Uarco Business Forms* later expanded this language to allow the copyright of legal forms as long as there was a "trivial variation." The court in *Consolidated Music Publishers, Inc. v. Ashley Publications, Inc.* was the first to apply the trivial variation standard to public domain music. The plaintiff had published a book for beginning pianists called *Easy Classics to Moderns*, which consisted mostly of works in the public domain. The plaintiff's edition added editorial markings for fingering, phrasing, and dynamics. The defendant copied the work note for note, including several mistakes which were in the plaintiff's edition. In determining whether a copyright could subsist in plaintiff's edition of the public domain music, the court applied the trivial variation test and held that copyright protection is warranted where the plaintiff has contributed "at least a modicum of creative

104. 290 F. at 960. Thus, plaintiff's copyright did not preclude defendant's use of 6 similar bars out of a composition of 450 bars. *Id.*
105. 313 F.2d 143 (7th Cir. 1963).
106. *Id.* at 146-47.
107. 478 F.2d 764 (8th Cir. 1973). In *Uarco*, plaintiff created a legal form from his knowledge of legal forms in the public domain, using standard legal language. One of plaintiff's customers asked defendant printer to print some forms. Defendant printed identical copies of plaintiff's form, and plaintiff sued for copyright infringement. The court held that plaintiff's form did not exhibit the minimum requisite degree of creativity and originality to warrant copyright protection.
108. *Id.* at 766.
110. *Id.* at 17.
111. *Id.*
112. *Id.* at 18-19.
113. *Id.* at 18. In adopting the test, the court relied on *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102-03 (2d Cir. 1951).
work.’” 114 Under the copyright statute, however, the plaintiff is protected only to the extent of its editorial additions; 115 the copyright in this case would only cover the fingering and other markings added by the plaintiff, not the public domain music itself.

The trivial variation test was further refined in Plymouth Music Co. v. Magnus Organ Corp. 116 where fifteen public domain songs—including “Holiday Polka” and “Come to the Stable”—had been specially arranged by plaintiffs for use with the defendant’s chord organs. 117 Relying on Alfred Bell & Co. v. Catalda Fine Arts, Inc. 118 the court held that derivations of public domain works need only represent a “‘distinguishable variation’” to warrant protection. 119 In upholding the plaintiffs’ copyright, the court stated that originality in the context of derivative works “‘means little more than a prohibition of actual copying.’” 120

This test is quite broad, but not unnecessarily so. It removes from the public domain only that material which the author actually contributes. 121 Moreover, it does not immerse the court in difficult questions of originality and creativity—which, judging from the courts’ unfamiliarity with technical musical terms, 122 would seem to be a desirable goal.

III. TAKING MUSIC OUT OF THE PUBLIC DOMAIN

As Carte v. Duff 123 demonstrated, the rigid distinction between original and derivative works could once force a composition into the public domain. 124 This section of the Note examines judicial standards for removing works from the public domain.

A. Music Derived from Folksongs

In Italian Book Co. v. Rossi, 125 an Italian sailor who could not

---

115. This was finally made clear in 17 U.S.C. § 103 (1982). See supra notes 23–26 and accompanying text.
117. Id. at 678.
118. 191 F.2d at 102–03.
119. 456 F. Supp. at 679 (quoting Alfred Bell, 191 F.2d at 102).
120. Id. (quoting Alfred Bell, 191 F.2d at 103); see Hoague-Sprague Corp. v. Frank C. Meyer, Inc., 31 F.2d 583, 586 (E.D.N.Y. 1929).
121. See supra note 115 and accompanying text.
122. See supra notes 34, 41 & 84.
123. 25 F. 183 (C.C.S.D.N.Y. 1885).
124. See supra notes 14–19 and accompanying text.
125. 27 F. 2d 1014 (S.D.N.Y. 1928).
read music "learned" a song which he had heard when growing up. What he could not remember he filled in. The piece was later written down by a publisher and enjoyed great success. The defendant, who copied the song, argued that since the original folksong recalled by the sailor was in the public domain no claim for infringement could be brought.

The court found differences between the sailor's composition and other versions of the folksong, but it did not pursue those differences for evidence of any original contribution by the sailor. Rather, it found significance in the popularity of the sailor's version. The court reasoned that in reviving the popularity of the old song, the sailor "must" have added something original to it—of sufficient originality to warrant copyright protection. By using this analysis, the court assessed originality not by reference to the work itself, but by inferring it from public response.

This popularity analysis was later endorsed in Wihtol v. Wells, where the plaintiff had composed a choral version of a folksong he recalled from childhood. The significance of Wihtol is that the court granted copyright protection not only to the material added by plaintiff but to the public domain melody he recalled. This was a striking departure from Italian Book, which left the defendants free to compose their own variations of the folksong.

In both cases, the original folksong was only vaguely remembered by the composer. While the Italian Book court

\[\text{126. Id. at 1014. It is difficult to discern how one can "learn" a song that one already knew. In fact, the use of the term "learn" to describe the process by which the sailor produced the song in question is a strong indication that the song was already in existence when the sailor wrote it. He did not compose a piece, but learned an existing work.}\]

\[\text{127. Id.}\]

\[\text{128. Id.}\]

\[\text{129. Id.}\]

\[\text{130. The court even stated that "no one can say" how much of the work was original. Id.}\]

\[\text{131. See id. ("There must have been something which Citorello [the sailor] added which brought the old song back into popularity with his own people in this country, and sufficient, I think, to support his claim of copyright.").}\]

\[\text{132. 231 F.2d 550, 554 (7th Cir. 1956).}\]

\[\text{133. Id. at 551.}\]

\[\text{134. Id. at 554.}\]

\[\text{135. 27 F.2d at 1014.}\]

\[\text{136. This may have been what produced the inconsistent results. Because the original folksongs were inaccessible, the courts could not accurately determine the originality of the}\]
found originality only in the sailor's additions to the song, the Wihtol court found originality in the plaintiff's setting the melody down on paper. Despite the plaintiff's boyhood memory of the song, the court deemed it an "original work on the plaintiff's part when, some thirty years later, he devised a calculated melody score . . . for all to read." Although the plaintiff may well have made original contributions to the folksong in arranging it for chorus, it is difficult to see how he could be granted protection for the melody—especially on the basis of merely having preserved it.

1. Problems in Allocating Copyright Protection

*Wihtol* raises questions about the proper allocation of copyright protection in the context of folk music. Generally, folksongs are published through the efforts of two people, an informer and a collector. The informer is the native source of the song, the one who gives the tune to the collector. The informer is granted no copyright on the melody because he has not fixed it in a tangible form, such as notation or recording. The collector, on the other hand, can usually obtain a copyright. The policy behind this disparity of treatment is to reward the collector for the time and effort expended in searching out and recording a piece. Others have suggested that the collector should be treated as any other researcher. They argue that the discovery of a song should be treated like the uncovering of a historical fact, for which the collector has no copyright claim.


derivative works. This uncertainty seems to have caused the *Wihtol* court to grant broader protection than it might otherwise have.

137. 27 F.2d at 1014.
138. 231 F.2d at 554.
139. *Id.*
140. Indeed, plaintiff admitted that his choral arrangement contained a public domain melody. *Id.* at 553–54.
141. Sometimes, however, both functions are performed by the same person.
143. See 17 U.S.C. § 102(a) (1982) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression. . . .").
145. *Id.* at 213–15.
146. See, e.g., *id.* at 214.

Some courts have given copyright protection to an author's presentation of facts. The rationale has been that courts should protect the labor expended by an author in his research. In *Toksvig v. Bruce Publishing Co.*, 181 F.2d 664, 667 (7th Cir. 1950), the court held that the translation of a public domain work is copyrightable. Maps were given copyright protection when they evinced "a great deal of skill, labor, and expense." General Drafting Co. v. Andrews, 37 F.2d 54, 55 (2d Cir. 1930). On the other hand, the Zapruder photographs of the Kennedy assassination were denied copyright protection because "there
This debate brings up the fundamental question of the art form: Is music sound or is it the written notes? For evidentiary purposes, it is clear why the current copyright statute requires the element of fixation. But to say that a work which is admitted to have been in the public domain suddenly exists as a new work, copyrightable in its entirety, overlooks the fact that the end result of the copyrighted work, the musical sound itself, may well have been in the public domain for centuries. Would a visiting song and dance troupe from Latvia be liable for infringement of Wih-tol’s hymn if they sang the original version they learned as children? Could the informer of a folk tune be enjoined from teaching the song to a second collector if the first had already copyrighted his version?

2. The Need For Consistent Application of the Current Copyright Statute

These questions are best answered by consistently applying the current statute. This would allow copyright for the particular expression (even compilation) of a work, thus rewarding the collector for his efforts. On the other hand, it would not give the author a monopoly on a melody borrowed from the public domain. Copyright should not cover part of a nation’s cultural heritage unless the author has composed that part.

is a public interest in having the fullest information available on the murder of [the President].” Time, Inc. v. Bernard Geis Assoc., 293 F. Supp. 130, 146 (S.D.N.Y. 1968).

The cases involving maps and translations are distinguishable from those involving folk music in that folk music offers limited opportunities for independent access. A willing translator can usually be found for a public domain work. The source of a map is well defined and is usually accessible (although sometimes at great cost). The problem with public domain music is that it is often impossible to identify the source of the material so as to enable another person to obtain the original. “John Smith, on a hill in Kentucky,” for example, would not be a sufficiently precise citation to allow access by other researchers to the source of the music. Moreover, unlike public domain documents which can be preserved, many of the sources of public domain music are dying out. One example is “Simple Gifts,” a Shaker folksong. The Shakers are gradually fading out of existence. The great American composer Aaron Copland has used the tune in several of his works (e.g., “Appalachian Spring,” and several arrangements of the song). If the Shakers die out before Copland’s copyright expires, will he have the exclusive rights to the tune? Does it not make more sense to treat the tune as a historical fact and give Copland protection only for his individual expression of it?

147. See supra note 143.
B. Musical Elements in the Public Domain: Judicial Inconsistency as a Product of False Assumptions and Misconceptions

Traditional western music employs twelve tones arranged in a succession which, to a degree, is dictated by harmony. In some popular music, the average performer's instrumental or vocal ability imposes further restrictions on a composer. Within this finite system, courts have struggled to identify and define originality.

1. Melody

It should be the goal of copyright law to protect works of even modest originality, while preventing the removal of basic musical building blocks from the public domain. The problem is how to determine where the building blocks of music end and originality begins. Since many courts determine originality solely by reference to melody, the question may be phrased as follows: what is the simplest melody to which copyright can be granted? Line-drawing is not the answer. Submitted are two examples. In one, the commercial for Muehlebach Brewery, a two-note theme was deemed unworthy of copyright; in the other, a three-note theme was considered sufficiently original to warrant protection.

The Muehlebach Brewery commercial used two notes, c-g, and the lyrics “Tic Toc, Tic Toc, Time for Muehlebach” set to a clock-like rhythm. The court decided that composition of this two-note jingle was merely a mechanical exercise unworthy of copyright protection. "Bright Tunes Music Corp. v. Harrisongs Music, Ltd." involved a three-note theme from George Harrison's "My Sweet Lord" which was claimed to be an infringement of Ronald Mack's "He's So Fine."

A three-note pattern (consisting of a descending minor third interval followed by a descending major second interval) is the melodic motif with which both the Harrison piece and the Mack piece begin. After several repetitions of this motif, each piece then

149. See supra note 1.
150. See supra notes 86–88 and accompanying text.
151. Marks v. Leo Feist, Inc., 290 F. 959, 960 (2d Cir. 1923).
153. Id. at 731–32. See supra notes 37–41 and accompanying text.
155. Id. at 178.
proceeds with the same three-note pattern in its retrograde inversion (i.e., the motif is turned upside down and backwards):

<table>
<thead>
<tr>
<th>Motif A</th>
<th>Retrograde Inversion</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

In its analysis, the court stated that Mack’s “He’s So Fine” consisted of “four repetitions of a very short musical phrase, ‘sol-mi-re’ [which it referred to as motif A], altered as necessary to fit the words, followed by four repetitions of another short basic musical phrase, ‘sol-la-do-la-do’ [which it referred to as motif B].”

In comparing Mack’s piece to Harrison’s, the court noted that “My Sweet Lord” used “the same motif A (modified to suit the words) four times, followed by motif B, repeated three times, not four.”

Despite the permutations identified by the court, the melody in Bright Tunes is merely the natural outgrowth of a basic three-note motif. Motif B, a retrograde inversion of motif A, is a closely related product of the structure of motif A. Moreover, this simple melody is largely dictated by the harmony. Both songs contained only a two-chord harmonic progression: the repetition of a minor ii and a Major V chord. The melody is a bare outline of the underlying harmony. The repetition of la-do in motif B does little more than sustain the melodic outline of the harmony. The court failed to recognize not only the dependence of the melody on the harmony, but also that the whole melody is a natural outgrowth of a basic three-note motif.

Muehlebach involved a two-note melody comprised of a basic
musical building block: a fifth. The court in *Bright Tunes* was confronted with a three-note motif which gave the skeletal outline of some basic harmonic language. This is not to say that the melody in *Bright Tunes* exhibited no originality. A basic harmonic progression presents a composer with more choices than does a simple interval (e.g., a fifth). For instance, to outline the minor ii chord, Mack could have chosen any of four notes. He specifically chose two notes and placed them in a specific order: sol-mi. Though not a work of great sophistication, it does display some originality and artistic choice. It represents a first step from straight application of musical building blocks, as in *Muehlebach*, toward a level of artistic decisionmaking which evinces originality.

2. *Sliding Scale of Protection*

The works in *Bright Tunes* and *Muehlebach* stand at opposite ends of a gray area between originality and the public domain building blocks of musical language. The Muehlebach jingle, in setting the relationship of a fifth to lyrics, was almost a straight application of public domain elements. "He's So Fine" exhibited greater artistic choice than the jingle, but in merely outlining a two-chord progression it was not manifestly original. These two works define a gray area through which no bright lines of copyrightability should be drawn. Rather than making a stark distinction between protection and nonprotection, courts should use a sliding scale in addressing such works. They should tailor the scope of protection to the extent of a work's originality. The closer a work comes to straight application of musical building blocks, the more limited should be its scope of protection.

Extending any protection to the Muehlebach Brewery commercial creates a danger of removing musical building blocks from the public domain. Nevertheless, the unique combination of a public domain element with lyrics is worthy of limited protection—perhaps only a proscription against direct copying.

The melody in "He's So Fine" is a basic outline of a two-chord progression. It is not the only possible accompaniment to the harmony, but it is a simple, logical accompaniment. It could conceiv-

---

162. See supra note 41.
163. Although the court refers to the harmony as a minor ii chord, 420 F. Supp. at 179, from the melody it is obvious that the chord was a minor ii7. A minor ii7 chord consists of the notes: a-c-e-g. In motif A, Mack chose e-g (sol-mi).
164. See supra text following note 41.
ably be stumbled upon by anyone repeating the minor ii and Major V chord. Even with melodic fragments closely related to one another and to underlying harmonies, originality must be rewarded by protection. But such protection must take into account the possibility that someone may independently compose this simple melody. In awarding copyright protection to works of limited originality, the protection should be limited to the extent of that originality. Thus, George Harrison's “My Sweet Lord” should have been found an infringement of “He's So Fine” only if intentional copying could be proved.

The final group of works to be considered are those in which originality is self-evident due to the work's complexity and the circumstances of its composition. Such pieces should be afforded complete copyright protection—the presumption would be against accidental copying. As the complexity of a work increases, the likelihood of an accidental copying diminishes—and the defendant's access to the original work can more readily be presumed.

---

165. The Bright Tunes court noted that the melody “germinated” as Harrison was repeating the minor ii and Major V chord. 420 F. Supp. at 179.

166. Melodies are often short fragments that a composer develops to give the appearance of a longer melodic strand. These fragments can also be the germinating ideas for larger works. In the first movement of Brahms's Fourth Symphony, for example, the interval of a sixth is developed throughout the entire movement. The longer the melody and the less simplistic the relationship of latter fragments in the strand to earlier fragments, the greater the likelihood that copyright may subsist solely in the melodic element.

167. The court in Bright Tunes concluded that George Harrison did not intentionally copy the melody of “He's So Fine.” Instead, it decided that Harrison took the melody subconsciously. 420 F. Supp. at 180. Through an inquiry that almost amounted to psychoanalysis, the court decided that Harrison had picked the melody not because he liked it and thought it would be popular, but because his subconscious knew it had been popular before and told his conscious self to pick it. Id.

The court's assertions regarding Harrison's subconscious machinations were at best vague conjectures. Moreover, they failed to take into account the extraordinary changes in popular music and taste that occurred between the composition of these two works. Thus, it was groundless to assert that Harrison's subconscious knew that a melody which was popular before would be popular again. Indeed, the subconscious taking analysis seems so speculative as to be inherently unreliable.

“My Sweet Lord” may very well have been copied intentionally. The coincidence of common structure, melody, and ornamentation is certainly remarkable. What is surprising is that, conceding Harrison had no intent to copy “He's So Fine,” the court nevertheless gave complete protection to Mack's relatively simple melody.

168. Establishing copying by direct evidence is generally impossible, since the plaintiff rarely can produce a witness to the act of copying. Thus, copying is ordinarily established indirectly by proof of access and substantial similarity. 3 M. Nimmer, Nimmer on Copyright § 13.01[B], at 5–6 (1983).
3. Other Musical Elements

The protection of public domain building blocks does not apply only to melody, but to other musical elements as well. In Shaw v. Time-Life Records, big band leader Artie Shaw brought an unfair competition suit against Time-Life Records for using his arrangements of big band "classics," claiming that the distinctiveness of the arrangements contributed to the "Artie Shaw 'sound.'" The court decided that the arrangements were not distinctive enough and that no property interest could be had in the basic style of a performer.

But some stylistic elements are so distinctive and original that they warrant protection. Following the acclaim for the music from Chariots of Fire, for example, many commercials emulated the simple melodic line of a solo piano, sometimes accompanied by a pulsating synthesizer beat. Much of this imitation would probably not be considered an infringement under Shaw on the theory of promoting dissemination of innovative styles. But if the melody is so similar and the texture of the music for the commercial compositions further suggests the original Vangelis composition, a cause of action might very well lie under the distinctive quality rationale of Decca Records, since the combination of texture and melody produces the impression of the original work.

170. Id. at 205, 341 N.E.2d at 820, 379 N.Y.S.2d at 394.
171. Id. at 205-06, 341 N.E.2d at 820, 379 N.Y.S.2d at 394. The Shaw court cited with approval an earlier New York case, Miller v. Universal Pictures Co., 11 A.D.2d 47, 201 N.Y.S.2d 632 (1960), aff'd, 10 N.Y.2d 972, 180 N.E.2d 248, 224 N.Y.S.2d 662 (1962), in which the widow of orchestra leader Glenn Miller unsuccessfully claimed a property interest in the Glenn Miller "sound." The defendant had re-created the Glenn Miller "sound" by hiring and training an orchestra for the movie The Glenn Miller Story. The court stated that the plaintiff "never had, and certainly does not now have, any property interest in the Glenn Miller 'sound.'" Indeed, in the absence of palming off or confusion, even while Glenn Miller was alive, others might have meticulously duplicated or imitated his renditions. 11 A.D.2d at 49, 201 N.Y.S.2d at 634.

172. Although the Shaw case was decided prior to the enactment of the 1976 Copyright Act, courts continue to rely on its rationale. See e.g., Gee v. CBS, 471 F. Supp. 600, 611, 660-61 (E.D. Pa. 1979) (heirs of blues singer claimed that their rights in her singing style were abridged when defendant reissued recordings several decades later; court held no such protection to performers existed under applicable state law).


174. See supra notes 70-75 and accompanying text.
IV. EXPERT VS. REASONABLE PERSON: THE SEARCH FOR AN APPROPRIATE MUSICAL YARDSTICK

Although most copyright courts rely on expert testimony, they disagree as to the proper extent of this reliance. The problem arises in the context of two different inquiries: whether an infringement has actually occurred, and the extent of the infringement.

The *Jollie v. Jacques* court, in formulating a reasonable person standard, declared that a musical piece is an infringement if “the ear detects the same [melody] in the new arrangement.” By this vague standard, Mozart’s Piano Concerto in C Major, K. 503, and Tchaikovsky’s 1812 Overture, op. 49, are the same arrangement of the French national anthem, the “Marseillaise.” This standard was relaxed to a small degree in *Hein v. Harris*, where the court said that an infringement may be found if the two pieces sound the same to an average person.

The courts in *Supreme Records v. Decca Records* and *MCA, Inc. v. Wilson* allowed the reasonable person to decide whether arrangements were “distinctive” enough to warrant copyright.

---

175. 13 F. Cas. 910 (C.C.S.D.N.Y. 1850) (No. 7437).
176. *Id.* at 913. The *Jollie* court noted that such a determination will often require persons with ordinary musical skill and expertise to assist the court and jury. *Id.* at 914.
177. Compare the “Marseillaise” tune with the very similar melody in Mozart’s Piano Concerto in C Major, K. 503.
   The “Marseillaise”:

```
\[ \text{W.A. Mozart, Concerto no. 25 in C Major, K. 503, for piano and orchestra, Mvt. I, meas. 230-34 (1786):} \]
```

178. 175 F. 875 (C.C.S.D.N.Y. 1910).
179. *Id.* at 877.
182. The court in *Decca Records* stated that “[u]ltimately, the Judge, rather than attempting to resolve the different interpretations by musically trained listeners, must determine the question by putting himself in the position of the average person who would listen to the two records and determine whether such person would confound [one] with the other . . . .” 90 F. Supp. at 912. The *Wilson* court adopted a similar theory, stating that observa-
the Italian Book court allowed the mass of reasonable people (i.e., popularity) to determine the originality of an arrangement.\textsuperscript{183}

Most courts do rely on expert testimony to a great extent, since it is often essential in producing sufficient evidence. Sometimes the expert testimony is specifically mentioned; often it takes the form of judicial notice.\textsuperscript{184} Even the Hein court,\textsuperscript{185} despite its promotion of a rational person standard, relied on the analysis of experts to identify differences in musical arrangements.\textsuperscript{186} While these developments do not represent an abandonment of the reasonable person standard, they seem to allow the reasonable person to weigh his own assessment of a piece's originality against expert opinion.

\section{The Dangers Inherent in Note Counting}

Expert testimony often focuses on "note counting" of the melodic element. The notes of the infringing melody are lined up and compared with the notes of the "original" melody. Notes which fall in approximately the same place are then counted. This technique was used extensively in \textit{Selle v. Gibb},\textsuperscript{187} a recent infringement suit against the popular group, the Bee Gees. The Bee Gees were accused of copying the song of an amateur musician for use in the movie \textit{Saturday Night Fever}.

To prove the extent to which the two pieces were similar, both parties compared and counted notes in the closing melody lines.\textsuperscript{188} The defense also presented note-counting comparisons between the melodies at issue and several other popular and classical pieces, including Handel's "Judas Maccabaeus," Donizetti's "L'Eliser D'Amore," the coda from the Second Movement of Bee-

\begin{quote}
\textsuperscript{183} See Id. at 1175, 1177–78 (discussing plaintiff's expert testimony on note comparisons); Defendants' Post-Trial Exhibit A, Reply Memorandum of Defendants Submitted in Support of Motions for Judgment Notwithstanding the Verdict, New Trial, or Section 1292(b) Certificate, \textit{Selle} (demonstrating contrary interpretation of same note comparison).
\end{quote}
thoven’s Fifth Symphony, and the Beatles’ “Get Back.” The jury, having heard the evidence as to numerical note counting and having listened to the melodies, determined that the Bee Gees’ composition constituted an infringement.

Note counting is appealing to triers of fact because it has the outward appearance of a simple, systematic mechanism for unveiling the truth. The procedure, however, is highly susceptible to manipulation. Depending on the manner in which the notes are counted, the same musical passages can produce an almost perverse variety of results.

In Selle v. Gibb, for example, the defendants argued that the initial musical material at bars 1–4 of their composition contained only ten notes out of a possible twenty-two that fell within the same pitch and rhythmic pattern as those found in the comparable portion of plaintiff’s piece, and that there were only four such notes out of a possible twenty-five in bars 5–8:

This interpretation is deceptive for several reasons. The statement that there are twenty-two notes in the melody line at bars 1–4 ignores the fact that on three occasions a note is “tied” to the subsequent note. A “tie” between two consecutive notes that are identical in pitch signifies that instead of two discrete tones there

189. See Affidavit of Harold Barlow, Defendants’ Motion for Summary Judgment, Selle.

190. See 567 F. Supp. at 1177–79. Through his experts’ note and rhythmic comparisons, plaintiff sought to prove that defendants’ song was “so strikingly similar to the plaintiff’s as to preclude coincidence, independent creation, or prior source.” Id. at 1175. In contrast, defendants presented evidence of nonaccess and independent creation. Id. The court found plaintiff’s evidence insufficient to support the jury’s verdict, and granted defendants’ motion for judgment notwithstanding the verdict. Id. at 1183–84.

191. Defendants’ Post-Trial Exhibit A, Reply Memorandum of Defendants Submitted in Support of Motions for Judgment Notwithstanding the Verdict, New Trial, or section 1292(b) Certificate, Selle.

192. Id.
will be one continuous sound. Recognition of this practical incident of musical notation is crucial because the ear perceives only nineteen notes—not twenty-two. The proposition that merely ten out of twenty-two notes are the same thus overstates the case. (A similar discrepancy arises out of the claim that there are twenty-five notes in bars 5-8.) Assuming that as the fraction becomes larger the evidence of plagiarism grows more convincing, it is little wonder that the defense chose the largest denominator possible. Nor is it any wonder that the defense chose to use the number of notes found in its own melody (allegedly twenty-two) instead of the number contained in plaintiff's melody (sixteen), since ten notes out of sixteen (10/16) might be said—under this mode of analysis, at least—to suggest plagiarism more strongly than would 10/22.

The fact that the two melodies do not contain an equal number of notes adds yet another layer of perplexity to the "simple" note-counting method. It is meaningless to declare that one melody but not the other should provide the number of notes against which the identical notes are compared.

Regardless of competing interpretations, the primary weakness in any note-counting scheme is the faulty assumption that music can be identified merely by reference to the arrangement of pitch and rhythm in a melodic line. Other musical elements such as timbre, tempo, presence of additional melodic lines, register, harmony, and dynamics can significantly alter musical identity.193 Given that a composition's "personality" is a function of more than just pitch and rhythm, it is difficult to compare two pieces meaningfully within the vacuum of note counting. The weakness in its underlying assumption renders note counting a highly suspect test for infringement.

Moreover, it is questionable whether this type of expert testimony really advances the jurors' understanding of the music before them. The technique of melodic note counting tells the juror only why pieces sound alike, not how original they are—and originality is what copyright seeks to protect.194 Once the piece is played and the notes are counted, the jury is no more equipped to understand the testimony regarding the originality and complexity

193. See supra notes 85–90 and accompanying text.
194. Thus, the court in Arnstein v. Broadcast Music, Inc., 137 F.2d 410, 412 (2d Cir. 1943), considered "dissection" or "technical analysis" by itself to be an insufficient means of determining plagiarism.
of the compositional techniques that were used.\(^{195}\)

**B. The Reasonable Person as the Ultimate Consumer**

Nevertheless, the final determination of the substantiality of an infringement is left to the discretion of jurors.\(^{196}\) The rationale behind this procedure is that the average consumer is most qualified to judge whether one piece infringes on another. But this is only half true. Before a piece gets to the consumer, a performer or record producer first chooses an arrangement of the piece.\(^{197}\) In choosing one arrangement over another, the performer or producer may detect differences that would go unnoticed by consumers.\(^{198}\) If an arranger whose version was rejected by the performer sues for infringement, should not the expert performer’s assessment of the differences between the arrangements be given greater weight than that of a lay juror, who may be incapable of discerning any differences at all? This argument is even more compelling in the context of editions of public domain music, where the purchase is often made or promoted by experts.\(^{199}\) Without expert testimony, the reasonable person is simply not in a position to assess the substantiality of differences between derivative works.

**V. Alternatives and Suggestions**

In virtually every case discussed in this Note, the actual music at issue is conspicuously absent.\(^{200}\) Upon examining the music in controversy, one is often incredulous that the court was addressing the same composition.\(^{201}\) The author recognizes that many people do not read music or know its terminology. But just as courts must be familiar with amortization and capital gains in discussing tax, they must be familiar with notes and chords in discussing mu-

\(^{195}\) See, e.g., Arnstein v. Porter, 154 F.2d 464, 475 (2d Cir. 1946) (Clark, J., dissenting) (disapproving the way in which the “tinny tintinnabulations of the [pianist’s affidavits] resounded throughout the United States Courthouse to the exclusion of all else, including the real issues in the case.”).

\(^{196}\) Id. at 473 & n.22 (Clark, J., dissenting).

\(^{197}\) S. Shemel & W. Krasilovsky, This Business of Music 208 (rev. ed. 1977).

\(^{198}\) Typically, the arranger’s fee is not contingent on the recording’s popularity. He is often paid a flat sum by the producer or the artist. See id.

\(^{199}\) The “experts” referred to in this instance are advanced musicians and/or their teachers.

\(^{200}\) The only two cases cited herein which contain musical notation are Bright Tunes and Decca Records.

\(^{201}\) The court in Marks v. Leo Feist, Inc., 290 F. 959 (2d Cir. 1923), for example, would have permitted a separate copyright for a piece which merely varied the accent and rhythm of the original melody. Id. at 960. See supra notes 101–04 and accompanying text.
sic. Including musical notations in copyright decisions would greatly enhance the capacity of scholars to understand the reasoning of courts.

A. *Editions of Public Domain Music*

Editions of public domain music contain markings that a layperson would probably deem the most trivial variations. These markings include fingerings, dynamics, phrasing, and occasional editorial comments. The copyrighting of such works has been criticized in law reviews, but to the average musician these marks are vital. A difference in fingering (especially on a stringed instrument) is often the difference between a mediocre performance and one of artistry. This is equally true of bowing and

---

202. See Note, supra note 95, at 135–36 (criticizing courts that grant copyright protection for musical compositions whose only points of variance from another composition are phrasing and accent marks).

203. Fingering is the means by which an artist expresses his interpretation of a work. It also provides practical instruction to facilitate the playing of difficult passages. In choosing the fingering for even a single passage, the artist makes a wide variety of practical and artistic decisions. Because of the originality and intellectual labor required in designing them, fingerings are worthy of copyright protection. The thought processes involved can be demonstrated by three possible fingerings for the violin passage below, each containing its own set of technical and artistic considerations:

![Violin Notation](image)

J.S. Bach (possibly J.G. Goldberg), Sonata in C Major for two violins and harpsichord, BWV 1037, Mvt. I, meas. 3–4, 2d violin part (1741) (fingerings by Ronald P. Smith).

Roman numerals in violin notation are used to differentiate among the instrument's four strings, where the G string = IV, D = III, A = II, and E = I. Arabic numerals correspond to the digits of the left hand, where I = index finger and 0 = no finger (i.e., "open" string).

By starting with vibrato on the third finger and remaining on the same string at *, example (a) offers a richer sound and an even tonal quality. Unfortunately, this fingering will produce a pinched sound in the higher register, is stylistically inauthentic, and requires an extension (see brackets) which is technically awkward.

Example (b) is much safer, starting in a lower position (i.e., the left hand is closer to the scroll of the violin). Although the lower position is more authentic for Baroque music, its repetition of open strings is harsh and inauthentic. Since the phrase starts on the A string—a higher, brighter string—it will be difficult for the performer to match tone color and obtain the proper intensity when crossing to the D string.

Example (c) starts on the fourth finger. This is a very safe fingering, but will result in a thin vibrato. The pad of the fourth finger (the pinky) is much smaller than the pad of the third finger (ring finger); thus, a third finger vibrato is wider and richer. The switch to the A string at * highlights the subphrase beginning there. Nonetheless, example (c) forces the
The value of copyrighting editorial markings is that it encourages publishers to employ great performers and teachers and incorporate their fingerings and other editorial markings into musical scores. Thus, these traditions and artistic innovations will not be lost to future generations. Extending copyright to these editions also rewards those editors who, through diligent effort and research, have preserved the integrity of the original. If the trivial variation test were employed, the editor's contribution would gain protection. But such protection would extend only to the editor's individual expression, preventing unnecessary removal of material from the public domain.

B. Folk Music

With respect to folk music, one commentator has urged adoption of the European concept of droit moral, a doctrine which provides the author of a work with a right and remedy in addition to copyright. This commentator has also suggested coupling droit moral with a criminal statute that could be used against anyone deliberately claiming copyright of a public domain work.

performer to shift on second finger. While this shift may be lyrical and will add a subtle nuance, it is dangerous because it may add an unattractive slide or a break in the line. Moreover, it is inauthentic for Baroque music.

The foregoing explanation illustrates the minute considerations involved in the selection of fingerings for even a short passage of music. Nor do the enumerated examples exhaust the possibilities for fingerings this passage. The originality contributed by artistic fingerings is certainly sufficient to meet the trivial variation test. It is also sufficient to pass the mere mechanic test since artistic choices, by their very nature, are not merely mechanical.

204. 1 C. Flesch, The Art of Violin Playing 148 (1924).

205. Ivan Galamian, Josef Gingold, Leonard Rose, and many other great teachers of this century have contributed editions of public domain music.

206. Many editions, such as those by G. Henle Verlag or Weiner Urtext, provide appendices to show various interpretations of what the notes—which are questionable because of penmanship or seemingly conflicting harmonic structures—might really be.

207. Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99 (2d Cir. 1951). Copyright protection is extended to works whose authors contribute "something more than a 'merely trivial' variation . . . ." Id. at 102-03 (quoting Chamberlin v. Uris Sales Corp., 150 F.2d 512, 513 (2d Cir. 1945)). Originality in this context, according to the Catalda court, "'means little more than a prohibition of actual copying.'" 191 F.2d at 103 (quoting Hoague-Sprague Corp. v. Frank C. Meyer Co., 31 F.2d 583, 586 (E.D.N.Y. 1929)).


209. The doctrine of droit moral, or moral right, grants protection to a creator's artistic reputation as distinguished from the economic interest associated with copyright. See Roe deer, The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators, 53 Harv. L. Rev. 554, 578 (1940).

Several other ideas have been offered concerning folk music. To eliminate any confusion regarding the extent of an arranger's contribution, the composer might be required to submit a copy of the original work.\textsuperscript{211} If a composer gains success through the use of a public domain work, it has been suggested that an appropriate portion of the royalties and other payments received from such work be placed in a fund dedicated to promoting "understanding and appreciation" of music.\textsuperscript{212}

Another proposed alternative is giving copyright ownership of public domain works to the government, which would entail the use of a compulsory licensing system.\textsuperscript{213} This possibility, besides the extra bureaucracy it would require, raises the specter of government censorship by copyright law.\textsuperscript{214} This censorship could come in two forms. One would be the imposition of an aesthetic orthodoxy to which derivative works would be compelled to conform. Although some feel that government control over the use of public domain material to prevent the corruption of classic works is desirable,\textsuperscript{215} it would probably be best to leave this to public opinion and the passage of time. Such a laissez-faire approach is probably the best way to ensure that government does not discourage new styles and techniques.

The second form of censorship would come from the stifling of public opinion as expressed through folk music. Folk music has often played a vital role in the expression of political feelings, as evidenced by the protest songs of the 1960's. The copyright law could well be a tempting tool for quelling such expression in times of political unrest.\textsuperscript{216}

C. The Sliding Scale Approach

With regard to original works of fundamental simplicity, the stark distinction between protection and nonprotection should be

\textsuperscript{211} Id. at 200–01. Such submission might take the form of a written manuscript or tape recording. It is questionable, however, whether this approach would solve the problems presented in cases like Italian Book, where a work is taken out of the public domain.

\textsuperscript{212} See Coon, supra note 50, at 217–18. Such a redistribution of payments would recognize, to the most practicable extent possible, the contribution of the original author or, if anonymous, simply the origin of the work itself. Id. at 218.

\textsuperscript{213} Id. at 202–03.

\textsuperscript{214} Id. at 205.

\textsuperscript{215} Id. at 202.

\textsuperscript{216} See Newcity, The Universal Copyright Convention as an Instrument of Repression: The Soviet Experiment, 24 COPYRIGHT L. SYMP. (ASCAP) 1 (1980).
abandoned in favor of a sliding scale. Courts should tailor the scope of protection to the extent of a work's originality. The closer a composition comes to being a straight application of musical building blocks, the less protection it should be afforded—perhaps only a proscription against direct copying. If a work is slightly more complicated, it should be protected from intentional infringement, even where a direct copying has not been perpetrated. Finally, works of more conspicuous originality should be granted complete copyright protection.

D. Experts and Expert Juries

The use of experts is essential to achieving an informed analysis in an infringement suit—whether for derivative works or works comprised of a simple combination of public domain building blocks. Almost all courts rely on expert opinion for deciding the question of similarity, but determining the substantiality of that similarity is left to laymen. This approach ignores the fact that expert purchasers are often intermediaries between arrangers and the public. Their judgment of the substantiality of similarity between two arrangements can have a great impact on the ultimate success of a particular arrangement or edition. Thus, their assessments of substantiality should be given more weight, especially when the work in question will be used primarily by professional musicians. At the same time, experts should not be allowed to lead the courts, and their analyses should be confined to specific techniques. This would enable experts to provide the clearest possible picture of the internal workings of a composition without needlessly overextending copyright protection or confusing the factfinder.

Among the tests for derivative works, the trivial variation text

217. See supra notes 162–67 and accompanying text.
218. See supra notes 197–99 and accompanying text.
219. A so-called Schenkerian analysis (named for the theoretician Heinrich Schenker, who developed the technique as a means of (1) reducing any piece of music to a few basic types of underlying fundamental structure and (2) demonstrating the relationship between the fundamental structure and the actual composition) would be too broad and, by virtue of its subtlety, misleading in that it would draw similarities where the relationship between two pieces is tentative. A chord analysis, by contrast, is a more direct method of evaluating similarity between pieces.

Compare the Schenkerian analysis with the chord structure analysis in the following example:
seems most consistent with the current statute and best suited for application by judges and juries. While judges and juries lack the technical expertise to determine whether a substantial similarity exists between two derivative works, they are capable of detecting the sort of trivial variation for which copyright has been granted. Because it invokes only a meager amount of musical terminology, the trivial variation test can be applied with consistency by laymen. Moreover, it extends sufficient protection to public domain works while permitting copyright for extremely subtle arrangements.

Another possibility is impaneling a special jury drawn from a pool of "experts" (knowledgeable musicians) set up by local musicians' unions or ASCAP. The concept of special juries has recently been debated in the field of antitrust, where cases are so complex it is feared the average juror cannot sufficiently understand the issues and evidence to render a competent judgment. Jurors' previous experience has not, for the most part, prepared them to decide a case involving such technical concepts and

\[
\begin{align*}
\text{Perfect 4th} & \quad \text{Perfect 4th} \\
E^b & \quad A^b & \quad D^b \\
\text{I IV I V I V I V I V} & \\
\text{KEY: E}^b
\end{align*}
\]

L. von Beethoven, Symphony no. 3 in E-Flat Major, op. 55 ("Eroica"), meas. 93–105 (1804) (analyses by Lawrence Hampton). The top line, the Schenkerian analysis, offers broad outlines of the two consecutive perfect fourths. The bottom line, a chordal analysis of the harmonic progression, gives a clearer impression of local harmonic events (the harmonies as they are happening), and is less likely to draw tentative connections between two pieces.


221. Ravel's orchestration of Mussorgsky's Pictures at an Exhibition (1922) does not change a note of Mussorgsky's original piano composition until the end of the very last movement. Faithfulness to the original, along with the creative vitality of the orchestration, make it a work of genius.

222. For a discussion of special juries, see Luneburg and Nordenberg, Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping With the Complexities of Modern Civil Litigation, 67 VA. L. REV. 887 (1981).

The "experts" need not be virtuosi. All that is needed is someone who can read music and has some rudimentary idea of harmony and composition. Juries of steadily employed musicians need not be the standard. Anyone with the equivalent of approximately four years of piano lessons would have the requisite insight.

questions.\textsuperscript{224}

In recognizing the need for a special jury, one must accept the basic proposition that "[a]ll people are not equally capable of learning about new concepts and applying them to the solution of difficult problems."\textsuperscript{225} If the right to a jury trial is the right to a competent jury,\textsuperscript{226} copyright is an ideal area for the adoption of special juries. Copyright litigation often subjects juries to testimony regarding musical structure which is valueless without the technical expertise to assess the originality of those structures.\textsuperscript{227} Only through an "expert" musician's familiarity with musical terminology and knowledge of the novelty and sophistication of various musical techniques can well-reasoned, competent decisions be handed down.\textsuperscript{228}

\section*{VI. Conclusion}

This Note addresses two distinct areas of musical copyright. One involves derivative works and editions of public domain music.\textsuperscript{229} The other involves original works so simple that they constitute little more than outgrowths of musical building blocks.\textsuperscript{230} Although these areas are distinct, the underlying goal in both is the same: copyright must protect a composer's originality, but it must also preserve the availability of public domain music and ideas.

Derivative works have gradually gained more protection under modern statutes.\textsuperscript{231} In seeking to define originality in the context of derivative works, courts have struggled to formulate a

\begin{itemize}
\item \textsuperscript{224} See generally A. Austin, supra note 223.
\item \textsuperscript{225} Luneburg & Nordenberg, supra note 222, at 900.
\item \textsuperscript{226} In re Japanese Elec. Prods. Antitrust Litigation, 631 F.2d at 1079.
\item \textsuperscript{227} See supra notes 193–95 and accompanying text.
\item \textsuperscript{228} The decisions discussed in this Note show that most judges are incapable of gaining the requisite musical expertise to deliver well-reasoned opinions. Two of those decisions, Fred Fisher, 298 F. 145 (S.D.N.Y. 1924) (granting protection to do-re-mi ostinato), and Hein v. Harris, 175 F. 875, 876 (C.C.S.D.N.Y. 1910) (deprecating "monotonous" rag-time as "the lowest grade of the musical art"), were written by Judge Learned Hand, whose opinions "for more than half a century illuminated the law of copyright and unfair competition." B. Kaplan & R. Brown, Jr., Cases on Copyright, Unfair Competition, and Other Topics Bearing on the Protection of Literary, Musical, and Artistic Works 191 (3d ed. 1978). If such a luminary can deliver two of the most untenable rulings in musical copyright, it is certainly fair to suggest that less accomplished judges need further guidance from experts.
\item \textsuperscript{229} See supra notes 10–122 and accompanying text.
\item \textsuperscript{230} See supra notes 125–74 and accompanying text.
\item \textsuperscript{231} See supra notes 10–26 and accompanying text.
\end{itemize}
workable standard. Starting with the mere mechanic test, which focused less on originality than on technical musical skill, courts progressed to a substantiality test which awarded protection on the basis of differences between derivative and preexisting works. While an improvement over the mere mechanic standard, the substantiality test placed undue emphasis on melody as the source of a work's originality. Gradually, the substantiality test evolved into the more liberal trivial variation standard. This standard has helped to disabuse courts of the line drawing they engaged in under the mere mechanic test. It is a desirable standard in that it gives protection to the individual expression of an editor or arranger. Unfortunately, even the trivial variation test has been applied without a grasp of basic musical terminology.

Protection of public domain musical building blocks has consistently been mishandled and neglected by the courts. This Note addresses melodic, harmonic, and stylistic elements which are part of the public domain, but which can be combined to form works containing a degree of originality. Rather than endorsing the stark distinction between protection and nonprotection for works comprised of building blocks, this Note suggests that a sliding scale be adopted. This approach would tailor the scope of copyright protection to the extent of a work's originality.

Without input from expert musicians, neither the trivial variation test nor the sliding scale approach can be applied with any coherence. Courts have consistently shown themselves incompetent to deal with musical terminology. This Note suggests that a jury of experts be impaneled to decide copyright cases. Only with the assistance of experts familiar with compositional techniques and basic musical terminology can courts begin to reach well-reasoned opinions.

The proposals in this Note are both practical and flexible. The trivial variation test proposed for derivative works and the sliding

232. See supra notes 27–122 and accompanying text.
233. See supra notes 27–57 and accompanying text.
234. See supra notes 58–100 and accompanying text.
235. See supra notes 79–90 and accompanying text.
236. See supra notes 101–22 and accompanying text.
237. See supra notes 152–63 and accompanying text.
238. See supra notes 160–63 and accompanying text.
239. See supra notes 169–74 and accompanying text.
240. See supra notes 123–74 and accompanying text.
241. See supra notes 164–67 and accompanying text.
242. See supra notes 34, 41 & 84 and accompanying text.
243. See supra notes 218–28 and accompanying text.
scale approach for works comprised of building blocks will finally eliminate linedrawing. Works will no longer be divided into stark categories of copyrightable and noncopyrightable. A composer will finally be awarded protection for his individual expression. And expert juries will ensure that the scope of protection is determined with sensitivity and discrimination.

Soon, modern techniques such as computer music, aleotoric music, 244 and serialism will come before the courts. Faced with these new forms, older approaches like melodic analysis and the mere mechanic test will prove obsolete. To be viable in the future, copyright analysis must eschew linedrawing and a preoccupation with melody. These are the advantages of the sliding scale and trivial variation approaches. Moreover, use of experts will guarantee the flexibility to accommodate new musical forms. The suggestions formulated in this Note will enable the law of musical copyright to resolve disputes with greater sensitivity to the art form it addresses.

RONALD P. SMITH

244. Aleotoric composition is the technique of sequencing and juxtaposing improvisations. D. GROUT, supra note 57, at 721 n.11.