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ISSUES FACING LEGAL PRACTITIONERS IN MEASURING SUBSTANTIALITY OF CONTEMPORARY MUSICAL EXPRESSION

ALAN KORN

ABSTRACT

Modern composers of jazz, avant-garde, hip-hop and world music increasingly rely upon unconventional sounds and advances in recording technology to create new and innovative musical works. As one might expect, courts now face the difficult challenge of applying traditional copyright analysis to these contemporary works to determine whether they embody protectable expression. This article highlights some of the issues specific to innovative musical works and the split among the U.S. Circuit Courts in how to measure the substantiality of these works. Copyright practitioners and composers alike should be aware of these challenges in evaluating the extent of copyright protection for contemporary musical expression.

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ISSUES FACING LEGAL PRACTITIONERS IN MEASURING SUBSTANTIALITY OF CONTEMPORARY MUSICAL EXPRESSION

ALAN KORN*

"The law, for all its stages of evolution, has a long way to go before it will be able to deal intelligently with the problems specific to jazz."[1]

INTRODUCTION

In recent years, courts have increasingly been asked to analyze the qualitative and quantitative significance of contemporary or "difficult" music. This article looks at several issues facing litigators when attempting to apply existing copyright law to challenging twentieth (and twenty-first) century musical forms, including jazz, electronic, and avant-garde works.

I. DEFINING WHAT CONSTITUTES A PROTECTIBLE MUSICAL EXPRESSION

Today's popular music often bears little resemblance to the popular music of an earlier era. In the last twenty-five years, advances in digital recording technology have enabled artists and producers to shape and reshape discrete "bits" of musical information to create multi-layered collage-based works that enjoy tremendous popularity. As a result, popular music today borrows (and samples) everything from Bollywood film music to Taiwanese aboriginal folk songs and avant-garde jazz. Along with the commercial ascendancy of rap and hip-hop (which have popularized previously avant-garde forms such as *music concrete*) is the continuing popularity of other innovative musical forms, including modern jazz, electronica, trance, and dub. World music also continues to grow in popularity, due in part to the increasingly multicultural fabric of American life, and widespread access to new media, such as

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The author wishes to extend his thanks to Samuel R. Miller, whose authorship of the petition for certiorari in *Newton v. Diamond* formed the foundation for Part III of this article.

[1] BARRY KERNFELD, WHAT TO LISTEN FOR IN JAZZ 117 (Yale University Press 1995).

the Internet and MP3 technology, that allow for instantaneous access to music from across the globe.[2]

As the Sixth Circuit recognized in the digital sampling case of *Bridgeport Music, Inc. v. Dimension Films*,[3] technological advances coupled with the popularity of hip-hop and rap music have spawned a plethora of copyright disputes and litigation.[4] One result is that courts are increasingly asked to analyze difficult or unfamiliar musical works from a variety of genres, including jazz, avant-garde, world music, and (again) hip-hop.[5] This difficult analysis in turn creates new challenges for the courts, because so much case law in the United States derives from an earlier era, when songs were published in folios and Tin Pan Alley songwriters emphasized melody and harmony over tonal and textural elements.[6]

Of course, the legal system by its nature adheres to precedent set by prior case law. However, that precedent has failed to keep up with important shifts in how contemporary music is composed by its practitioners or appreciated by its audience. As a result, the legal system continues to analyze difficult compositional works based on a definition of music that may no longer be adequate to the task. For instance, the leading treatise on copyright law in the United States suggests originality in music is limited to only "rhythm, harmony and melody."[7] Nimmer's narrow view of what constitutes protectable musical expressio[8] continues to be cited by the courts, including in recent cases such as *Bridgeport Music, Inc. v. Still N the Water Publishing*[9] and *Newton v. Diamond*.[10]

Regrettably, the above definition of music fails to account for unique methods of musical expression that exist beyond those narrowly drawn boundaries. Fortunately, not all legal commentators have embraced such a limited understanding of originality in music. As one prominent commentator has observed:

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[2] *See* Andrew K. Burger, *Digital Music, Part 1: An Expanding Universe*, E-COMMERCE TIMES, Nov. 13, 2006, http://www.ecommercetimes.com/story/54205.html. "Along with technological innovation, the increasing mobility of labor, growth in international immigration and travel, falling barriers to trade and investment, and the spread of more open, democratic governments around the world have all contributed to the growth of the world music genre." *Id.*

[3] 383 F.3d 390, 396 (6th Cir. 2004) (stating making music through digital sampling is common because it is cost-saving, fast, and easy).

[4] *Id.* at 396.

[5] *See, e.g.*, Carol Weisbrod, *Fusion Fold: A Comment on Law and Music*, 20 CARDOZO L. REV. 1439, 1439 (1999) ("[O]f all the arts, music is the prototypical example of this: It is at once completely enigmatic and totally evident. It cannot be solved, only its form can be deciphered.") (citation omitted).

[6] ISAAC GOLDBERG WITH GEORGE GERSHWIN, TIN PAN ALLEY: A CHRONICLE OF THE AMERICAN POPULAR MUSIC RACKET 84–85 (John Day Co. 1930).

[7] 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.05(D) (2004) ("It has been said that a musical work consists of rhythm, harmony and melody, and that originality, if it exists, must be found in one of these.").

[8] *Id.*

[9] 327 F.3d 472, 475 (6th Cir. 2003) ("A musical composition consists of rhythm, harmony, and melody.").

[10] 204 F. Supp. 2d 1244, 1249 (C.D. Cal. 2002), *aff'd on other grounds*, 388 F.3d 1189 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 2905 (2005) ("A musical composition consists of rhythm, harmony, and melody, and it is from these elements that originality is to be determined.").

> Originality in a musical composition consists not just of melody or harmony, but also in the combination of these two in addition to any other elements, such as rhythm or orchestration. Indeed, melody and harmony need not be present at all, as in Krzystof Penderecki's chilling "Threnody for the Victims of Hiroshima," which uses clusters of dissonant sounds to convey a powerful emotional message. Color may too form an important protectable element. Arnold Schoenberg in his 1911 textbook on harmony, *Harmoielehre*, advanced a musical technique whereby color played the central compositional element. This technique, coined "Klangfarbenmelodie" (sound-color-melody), was put in to practice in the third movement ("Farben") of Schoenberg's Five Pieces for Orchestra (Opus 16) and consisted of a relatively static series of chords above which a polyphony of timbre (color) was created by the swapping of notes among the various instruments of the orchestra.[11]

Recently, other courts have also begun to take a more expansive approach when analyzing musical works. For instance, in *Swirskey v. Carey*[12] the Ninth Circuit panel observed that musical compositions may include melody, harmony, rhythm, pitch, tempo, phrasing, structure, and chord progressions.[13] Similarly, in *Ellis v. Diffie*[14] the lower court compared idea, phraseology, lyrics, rhythms, chord progressions, "melodic contours," structures, and other musical elements. Nevertheless, many courts continue to rely on Nimmer's narrow focus on melody, harmony, and rhythm, notwithstanding fundamental paradigm shifts over the last 100 years that have altered how music is composed and enjoyed.[15]

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[11] 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT, § 3:93, 3-267 to 3-269 (Thompson/West 2006). *See also* Tempo Music, Inc. v. Famous Music Corp., 838 F. Supp. 162, 168 (S.D.N.Y. 1993) ("[I]n contemporary music, and particularly in the jazz music genre, musicians frequently move beyond traditional rules to create a range of dissonant and innovative sounds.").

[12] 376 F.3d 841, 849 (9th Cir. 2004).

[13] *Id.* at 849.

[14] 177 F.3d 503, 506 (6th Cir. 1999).

[15] *See, e.g.*, JOHN CAGE, SILENCE 3 (Wesleyan University Press 1961) ("If this word 'music' is sacred and reserved for eighteenth- and nineteenth-century instruments, we can substitute a more meaningful term: organization of sound."). As the composer Edgard Varese observed in 1962:

> Although this new music is being gradually accepted, there are people who, while admitting that it is "interesting," say: "but is it music?" It is a question I am only too familiar with. Until quite recently I used to hear it so often in regard to my own works that, as far back as the twenties, I decided to call my music "organized sound" and myself, not a musician, but "a worker in rhythms, frequencies and intensities."

Edgard Varese, *The Liberation of Sound*, *in* AUDIO CULTURE: READINGS IN MODERN MUSIC 20 (Continuum International Publishing Group Ltd. 2004). *See also* PATRY, *supra* note 11, at 3-269.

> The scope of protection for music has suffered from a mistaken belief (undoubtedly limited to non-musicians) that "the vocabulary available for musical composition is far less rich and enables far less invention than the vocabulary of literature, drama and the visual arts." This premise is no more true than the proposition that English literature is limited because there are only 26 letters in the alphabet. One can listen to the cantatas of Bach, the songs of Schubert, or Beethoven's 33 variations on Anton Diabelli's turgid waltz theme, to say nothing of John Coltrane's radically different 1957 and 1962 recordings of his own composition *Traneing In*,

II. THE PROBLEM OF MUSIC NOTATION AND CONTEMPORARY MUSIC

A. Written Notation and Jazz

Another significant challenge facing courts in evaluating contemporary music is how to analyze works, which may have been improvised or created spontaneously, like jazz, or created primarily in the recording studio, like dub reggae, electronica, and hip-hop. As Brian Eno noted with respect to his own ambient music "a recording composer may spend a great deal of her compositional energy effectively inventing new sounds or combinations of sounds."[16] Unfortunately, many aspects of sound, like timbre, cannot be accurately depicted in any conventional written notation.[17] Until recently it was relatively easy for courts to analyze musical works through the prism of standard ninetieth-century notation. But strict reliance on written notation may be inadequate when evaluating the substantiality of contemporary music.[18] This is because any system of transcribing music is, at best, a kind of shorthand.[19] While jazz and new music composers continue to use Western staff notation, this music is not always adequately expressed by traditional notational methods.[20] Written notation may suffice at representing the melody of a jazz composition, but it is often unable to convey deviations from standard pitch, including compositional elements like vibrato, blue notes, bends, and microtonal and intonational nuances.[21]

The limitations inherent in standard notation are further compounded by the fact that many courts continue to view music notation as if it were the composition itself, rather than a series of instructions telling the performer how to reproduce that musical work.[22] One result is that courts may sometimes adopt a formulaic approach that simply involves counting the number of notes or pitches on the page, rather than a more nuanced and holistic analysis that includes careful listening to the disputed works.[23] One example of the former approach is the digital sampling case of *Newton*

> countless other jazz renditions of popular songs and marvel at how such a wrongheaded idea can be perpetuated.

Id.

[16] *See* Brian Eno, *Ambient Music*, *in* AUDIO CULTURE: READINGS IN MODERN MUSIC 95 (Continuum International Publishing Group Ltd. 2004).

[17] *See, e.g.*, H. COLE, SOUNDS AND SIGNS: ASPECTS OF MUSICAL NOTATION SOUNDS AND SIGNS 95 (Oxford University Press 1974).

[18] *See* Charles Seeger, *Prescriptive and Descriptive Music-Writing*, 44 THE MUSICAL QUARTERLY 184–95 (1958) (describing limitations of conventional notation in music analysis).

[19] *See id.* at 186.

[20] ROBERT WITMER & RICK FINLAY, 3 THE NEW GROVE DICTIONARY OF JAZZ 168 (Barry Kerfeld ed., 2d ed. 2002).

[21] *Id.* at 170. *See also* Ter Ellingson, *Notation*, *in* ETHNOMUSICOLOGY: AN INTRODUCTION 154 (Helen Myers ed., 1992) (observing African and Asian musical forms, particularly jazz and spirituals, place far less emphasis on written notation); THE HARVARD DICTIONARY OF MUSIC 416, 509–10 (Don Michael Randel ed., 4th ed. 2003) (microtonal and intonational nuances defined as subtle interval and pitch changes).

[22] *See, e.g.*, Newton v. Diamond, 204 F. Supp. 2d 1244, 1249 (C.D. CA 2002). The district court observed "[a] musical composition captures an artist's music in *written* form." *Id.* (emphasis added).

[23] Helen Myers, *Introduction*, *in* ETHNOMUSICOLOGY: AN INTRODUCTION 3, 15 (Helen Myers ed., 1992) (describing history and diversity of non-notational music analysis); Lawrence Ferrara, *Phenomenology as a Tool for Musical Analysis*, 70 THE MUSICAL QUARTERLY 355, 359 (1984) (describing an "eclectic" method of music analysis into modern works that requires "open listening" to "sound in time"). *See also* HARVARD DICTIONARY OF MUSIC 36 (Willi Apel ed., 2d ed. 1972) (music

v. Diamond,[24] which involved a work for solo flute that made compositional use of multiphonics, i.e., the use of multiple simultaneous pitches on an instrument designed to create a single pitch.[25]

B. The Case of Newton v. Diamond

In *Newton v. Diamond*, the Beastie Boys sampled a six-second excerpt from the solo flute composition *Choir* by avant-garde jazz flutist and composer James Newton.[26] This sample was then lowered slightly in pitch and looped throughout the band's composition *Pass the Mic*.[27] According to James Newton, the song *Choir* was inspired by his earliest childhood memory of watching four women singing in a church in rural Arkansas.[28] To reproduce those four voices, *Choir* used slowly ascending and descending vocalizations over a sustained flute note to create a shifting set of multiple pitches, which arose from the difference in frequencies between the dissonant sung pitch and overblown flute note.[29] In addition to African-American gospel music, the song *Choir* also incorporated elements of Japanese ceremonial court music ("gagaku"), traditional African music, and classical idioms.[30]

The Beastie Boys sampled *Choir* from James Newton's 1982 LP, *Axum*, on ECM Records and licensed the sound recording from ECM.[31] However, the Beastie Boys declined to license the underlying composition from Newton.[32] Despite (or perhaps because of) the harmonic complexity of his solo flute composition and the relative simplicity of the written score deposited with the Copyright Office, the district court ruled on summary judgment that *Choir's* multiphonics were merely "elements of Plaintiff's performance" that were unique to the ECM recording licensed by the Beastie Boys.[33] After filtering out those multiphonic sounds, the district court concluded that the vocal notes C—D flat—C notated in the *Choir* score lacked sufficient originality to merit copyright protection.[34] The district court also ruled that even if the sampled elements were original, the six-second excerpt from *Choir* was *de minimis* and therefore not actionable.[35]

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analysis is defined as "the study of a composition with regard to form, structure, thematic material, harmony, melody, phrasing, orchestration, style, technique, etc.").

[24] 388 F.3d 1189 (9th Cir. 2004).

[25] THE HARVARD DICTIONARY OF MUSIC 534 (Don Michael Randel ed., 4th ed. 2003) (defining multiphonics as "[t]wo or more pitches sounded simultaneously on a single wind instrument.").

[26] *Newton*, 388 F.3d at 1190, 1192.

[27] *Id.* at 1192.

[28] *Id.* at 1191.

[29] Newton v. Diamond, 204 F. Supp. 2d 1244, 1251 (C.D. CA 2002). *See also* IAN CARR, DIGBY FAIRWEATHER & BRIAN PRIESTLY, THE ROUGH GUIDE TO JAZZ 585 (3d ed. 2004) (describing *Choir* as a composition 'that deals in four voices holding a tone, singing a tone and the different tones between the two."). A copy of the *Choir* score deposited with the Copyright Office is included at the end of this article.

[30] *Newton*, 388 F.3d at 1191.

[31] *Id.*

[32] *Id.*

[33] *Newton*, 204 F. Supp. 2d at 1255–56.

[34] *Id.* at 1256.

[35] *Id.* at 1259.

In a split opinion, the Ninth Circuit affirmed the district court's ruling on the basis that the sampled excerpt constituted a *de minimis* portion of *Choir*.[36] Like the district court, the Ninth Circuit panel first filtered out "performance" elements it viewed as unique to the ECM recording.[37] Relying on the *Choir* score, the court observed that the sampled passage consisted of three sung notes over an overblown background flute note, with notations for tempo. Although it acknowledged *Choir* was a multiphonic composition, the court ruled this "three note" sequence was unworthy of legal protection because the musical sounds on the ECM recording were due to Newton's "highly developed performance techniques, rather than the result of a generic rendition of the composition."[38]

The Ninth Circuit's ruling was not unanimous. In a dissenting opinion, Justice Susan Graber argued the sampled portion of *Choir* was distinctive and substantial enough to constitute more than *de minimis* taking.[39] Citing Newton's music expert, the dissent observed that the distinctiveness of *Choir*'s sound was not due to Newton's performance technique on the ECM recording, but was instead a built-in component of the score itself.[40] The dissent argued that the majority reached its contrary conclusion by quoting Newton's expert report out of context and reversing his intended meaning.[41]

Regardless of the court's disputed findings, what remains clear is that the Ninth Circuit's analysis in *Newton v. Diamond* allowed the court to avoid more difficult questions raised by the limitations of standard written notation in representing harmonic or textual nuance in contemporary music. The narrow focus on three notated vocal pitches by the district court and Ninth Circuit panel also underscores the deference that courts will often give to standard written notation despite its inherent drawbacks in representing a composer's intentions[42] especially when compared to audio recordings by those authors.[43]

III. THE CIRCUIT SPLIT CONCERNING HOW TO EVALUATE CHALLENGING MUSICAL WORKS

Another outstanding issue for composers and legal practitioners is that of whose perspective to use when evaluating innovative musical works. As Nimmer and

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[36] *Newton*, 388 F.3d at 1196–97.

[37] *Id.* at 1193–94 ("[W]e must 'filter out' the licensed elements of the sound recording to get down to the unlicensed elements of the composition . . . ."). Newton released three separate commercial recordings of *Choir* in 1978, 1982 and 1988. *See e.g.*, TOM LORD, 16 THE JAZZ DISCOGRAPHY N219–N221 (1997). However, neither the district court nor the Ninth Circuit panel sought to compare Newton's 1982 ECM recording with his other published recordings of *Choir*.

[38] *Newton*, 388 F.3d at 1194.

[39] *Id.* at 1197 (Graber, J., dissenting).

[40] *Id.* at 1198.

[41] *Id.* at 1197–98.

[42] Given this tendency and to avoid unjust results, composers registering their work with the Copyright Office will certainly want to deposit audio recordings, rather than lead sheets, to bolster their argument that tone, timbre, intonation, harmonics and other distinctive musical elements also constitute part of the song's protectable copyright.

[43] *See e.g.*, B. Bartok & B. Lord, Serbo-Croatian Folk Songs, 3 (1951) (Composer Bela Bartok observing that "The only true notations are the sound-tracks on the record itself.")

others have recognized, measuring the substantiality of a work "presents one of the most difficult questions in copyright law . . . ."[44] Complicating this issue for copyright practitioners is the continuing split between the circuit courts regarding which legal standard to use when measuring the substantiality of innovative or challenging artistic works.

A. The "Ordinary Audience" Approach

Typically, in cases where only a portion of a copyrighted work is allegedly copied, courts apply a threshold inquiry into whether the portion copied was *de minimis*, under the maxim *de minimis non curat lex* (i.e., "the law does not concern itself with trifles").[45] However, the federal circuit courts remain divided as to which legal standard to use when measuring the substantiality of difficult or technically complex artistic works. Currently, a majority of courts (including the District of Columbia, the First, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits) view the substantiality of a plaintiff's work from the perspective of the "average audience" or "ordinary observer" approach, without regard to the complexity of the work at issue. For instance, in *Newton v. Diamond* the Ninth Circuit panel held that both the *de minimis* and substantial similarity tests look to "the response of the average audience, or ordinary observer, to determine whether a use is infringing."[46] This "ordinary lay audience" test is also applied in other Ninth Circuit cases involving musical works, including *Fisher v. Dees*,[47] *Baxter v. MCA, Inc.*,[48] *Three Boys Music Corp. v. Bolton*,[49] and *Swirsky v. Carey*.[50] Cases in other circuits adopting a similar ordinary audience approach when evaluating artistic works include *Segrets, Inc. v. Gillman Knitwear Co.*,[51] *Atkins v. Fischer*,[52] *Susan Wakeen Doll Co. v. Ashton-Drake Galleries*,[53] *Taylor Corp. v. Four Seasons Greetings, LLC*,[54] *Wihtol v. Crow*,[55] *Country Kids 'N City Slicks, Inc. v. Sheen*,[56] and *Calhoun v. Lillenas Publishing*.[57]

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[44] 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03(A) (2006).

[45] *See, e.g.*, *Newton*, 388 F.3d at 1193.

[46] *Id.* at 1193.

[47] 794 F.2d 432, 434 n.2 (9th Cir. 1986) ("a taking is considered *de minimis* only if it is so meager and fragmentary that the average audience would not recognize the appropriation.").

[48] 812 F.2d 421, 424 (9th Cir. 1987) (utilizing the test of substantial similarity by the "response of the ordinary lay hearer.").

[49] 212 F.3d 477, 485 (9th Cir. 2000) (stating the intrinsic test for substantial similarity asks "whether the ordinary, reasonable person would find the total concept and feel of the works to be substantially similar.").

[50] 376 F.3d 841, 847 (9th Cir. 2004) (stating the intrinsic test requires the ordinary, reasonable person would find the music to be substantially similar).

[51] 207 F.3d 56, 66 n.11 (1st Cir. 2000) (stating the intrinsic test for substantial similarity is an 'ordinary observer test.'").

[52] 331 F.3d 988, 993 (D.C. Cir. 2003) (holding that "[t]he question is whether 'an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work'").

[53] 272 F.3d 441, 451 (7th Cir. 2001) ("This court applies the 'ordinary observer' test to determine whether a substantial similarity exist[s].").

[54] 315 F.3d 1039, 1043 (8th Cir. 2003) ("The purpose of the intrinsic test is to ascertain if the works at issue are so dissimilar that ordinary 'reasonable minds cannot differ as to the absence of substantial similarity in expression.'").

B. The "Specialized Audience" Approach

While a majority of circuits have adopted an average audience or ordinary observer approach when analyzing complex musical works, this standard is not universally followed. This is because difficulties may arise when an ordinary lay audience is confronted with unfamiliar genres beyond the musical mainstream. The Third, Fourth, and Sixth Circuits have recognized that ordinary lay persons may be unable to understand and appreciate certain complex and technical works.[58] Accordingly, these circuits apply the perspective of a specialized audience when analyzing these works, based on the view that an ordinary lay audience test undermines copyright law when a plaintiff's work can only be appreciated by a specialized audience.[59]

The Fourth Circuit specifically addressed this issue in *Dawson v. Hinshaw Music, Inc.*, a case involving the arrangement of a spiritual entitled *Ezekiel Saw de Wheel*.[60] The court in *Dawson* held that when measuring substantiality of a spiritual composition or other work, the court must consider whether an understanding of the protected work requires an evaluation by persons who possess specialized expertise that lay people would lack.[61] Here, the Fourth Circuit was especially critical of courts that fail to recognize this distinction:

> [O]nly a reckless indifference to common sense would lead a court to embrace a doctrine that requires a copyright case to turn on the opinion of someone who is ignorant of the relevant differences and similarities between two works. Instead, the judgment should be informed by people who are familiar with the media at issue.[62]

As a result, the Fourth Circuit in *Dawson* remanded the matter back to the district court with instructions to determine whether the arrangements of both songs had a distinct audience, and if so, to take additional evidence concerning whether that audience would find the disputed works to be substantially similar.[63] "To hold otherwise would be to allow the imprecise 'ordinary lay observer' label to effect a

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[55] 309 F.2d 777, 780 (8th Cir. 1962) (applying the "ordinary observer" test in copyright suit for infringement of a spiritual composition).

[56] 77 F.3d 1280, 1288 (10th Cir. 1996) ("the 'ordinary observer' test is an appropriate method for the court to use in its comparison analysis.").

[57] 298 F.3d 1228, 1232 (11th Cir. 2002) (applying the "average lay observer" test in copyright suit for infringement of spiritual composition).

[58] *See, e.g.*, Computer Assocs. Int'l., Inc. v. Altai, Inc., 982 F.2d 693, 713 (2d Cir. 1992) (applying specialized audience test to computerized works). The Second Circuit appears to draw a distinction between computer-related works, where it applies a specialized audience approach, and aesthetic works, in which an ordinary observer test is applied. *Id. See also, e.g.*, Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127, 130, 134–35 (2d Cir. 2003) (overturned district court ordinary observer test stating "[t]he court . . . must analyze the two works closely" to determine the differences and similarities between the two works of art).

[59] Dawson v. Hinshaw Music, Inc., 905 F.2d 731, 736–37 (4th Cir. 1990), *cert. denied*, 498 U.S. 981 (1990).

[60] *Id.* at 732.

[61] *Id.* at 736–37.

[62] *Id.* at 735 (citation omitted).

[63] *Id.* at 738.

betrayal of the fundamental purposes of copyright doctrine and the substantial similarity test." [64] Other circuits applying a similar approach include *Lyons Partnership, L.P. v. Morris Costumes, Inc.*,[65] *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.*,[66] and *Kohus v. Mariol*.[67]

Given the above split of authority, a certain amount of forum shopping among copyright litigators may be inevitable. A prudent plaintiff's attorney may conclude that her client would obtain a more favorable result in the Third, Fourth, or Sixth Circuits, at least where the musical or other artistic work in dispute is one that requires a specialized audience. Conversely, counsel representing defendants in infringement litigation may decide to seek jurisdiction in a circuit relying on the ordinary audience standard, at least until this split is resolved by the U.S. Supreme Court. Until then, it is perhaps inevitable that an ever more confusing body of law will arise due to the disparate treatment these complex artistic works receive.

IV. CONCLUSION

Because the legal system often relies on decades-old case law to analyze fundamentally modern (and post-modern) disputes, it is not surprising that courts have sometimes been tone deaf to the unique problems facing jazz and other modern musical idioms. As these previously marginalized genres become absorbed into the musical mainstream, it is perhaps inevitable that the federal judiciary will eventually catch up with contemporary music practice and move beyond Nimmer's narrow definition of what constitutes originality in music. Even so, authors of innovative musical works may continue to face hurdles so long as the courts rely solely on standard written notation for purposes of analyzing their content.

Another hurdle facing modern composers remains the split among the circuit courts regarding how to measure the substantiality of challenging artistic work. It remains possible that the U.S. Supreme Court will one day take up this circuit split regarding whose perspective to take when assessing the quantity and quality of a sophisticated artistic works. For this issue will certainly continue to arise as previously marginalized works of art become rediscovered and recycled in our digital era. Until then, so long as an ordinary audience approach is used, many works of genius may be overlooked by the courts or receive substantially less protection than they deserve. As Justice Holmes famously observed in *Bleistein v. Donaldson Lithographing Co.*[68] with respect to analyzing originality in works of visual art:

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[64] *Id.*

[65] 243 F.3d 789, 801 (4th Cir. 2001) (holding that "the established copyright principles of this circuit" dictate that "when it is clear that the work is intended for a more particular audience, the court's inquiry must be focused upon the perspectives of the persons who comprise that group").

[66] 797 F.2d 1222, 1233 (3rd Cir. 1986) ("[T]he ordinary observer test is not useful and is potentially misleading when the subjects of the copyright are particularly complex . . . .").

[67] 328 F.3d 848, 857 (6th Cir. 2003) ("In cases where the target audience possesses specialized expertise . . . the specialist's perception of similarity may be much different from the lay observer's, and it is appropriate in such cases to consider similarity from the specialist's perspective.").

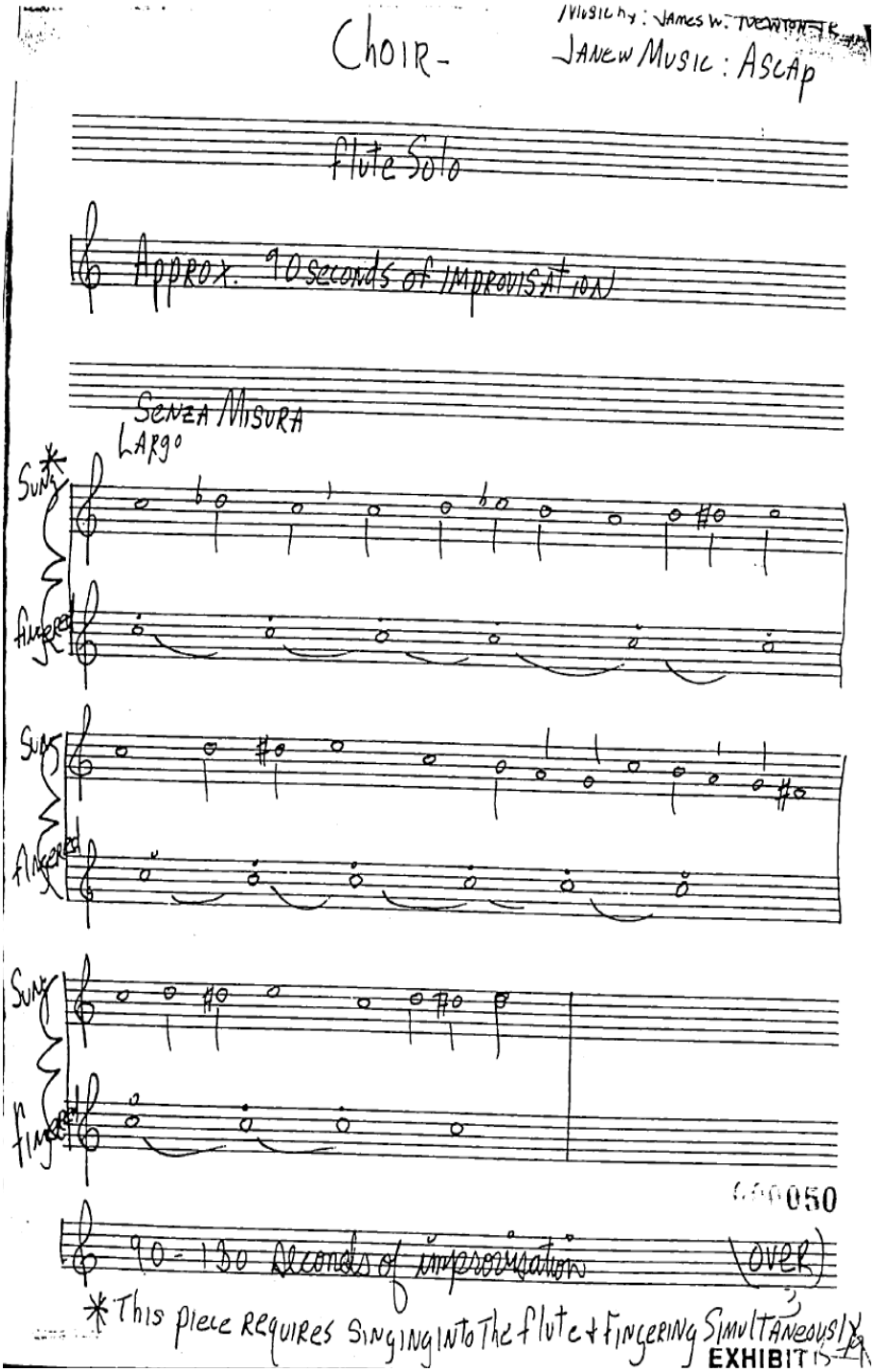
[68] 188 U.S. 239 (1903).

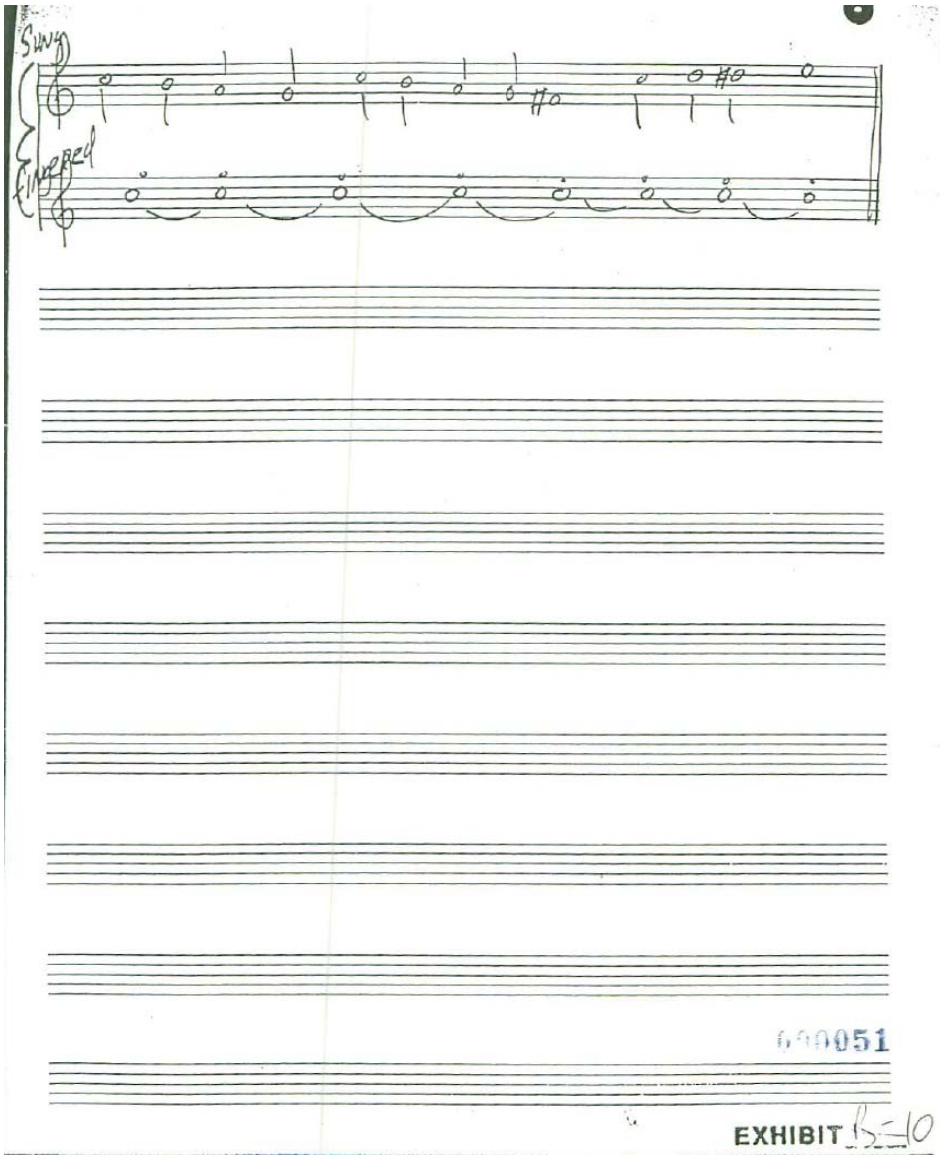
> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.[69]

Justice Holmes' admonition remains as relevant today as it was 100 years ago. For this reason, it is this author's hope that the U.S. Supreme Court will one day decide to resolve this circuit split and adopt an approach that respects, as much as possible, the widest diversity of musical and artistic expression, regardless of genre or culture of origin.

[69] *Id.* at 251.

APPENDIX


Choir-
Music by: James W. [illegible]
JANEW MUSIC: ASCAP
Flute Solo
Approx. 90 seconds of improvisation
Senza Misura
Largo
Sung
Fingered
050
90-120 seconds of improvisation
over
*This piece requires singing into the flute & fingering simultaneously
EXHIBIT 15


Suwa
Fingered
000051
EXHIBIT B-10