NOTE

Do You Hear What I Hear? Expert Testimony in Music Infringement Cases in the Ninth Circuit

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INTRODUCTION

A singer had a number one record.[1] A producer heard the singer's song and grew suspicious. The singer's song sounded similar to one of the producer's copyrighted songs. So similar, in fact, that the producer believed the singer copied his song. The producer sued the singer for copyright infringement. The singer motioned for summary judgment, insisting that she did not copy the producer's song and that the songs did not even sound very similar.

In deciding whether to grant a motion for summary judgment in a copyright infringement case, the Ninth Circuit considers only objective criteria under its test.[2] Naturally, the producer looked to a music expert to provide the requisite objective evidence. The expert, however, considered the music based on how it sounded to him. His analysis extended beyond the objective bounds laid forth by the court. Disregarding its own defined test, the Ninth Circuit agreed to deny the singer's motion for summary judgment on the strength of the expert's subjective testimony.

This Note examines the extent to which the Ninth Circuit properly used expert testimony when faced with a similar set of facts in *Swirsky v. Carey.* Part I reviews the Ninth Circuit's treatment of copyright protection of songs.[3] Part II describes the reasoning of the court in *Swirsky*.[4] Finally, Part III argues that the very nature of music renders any attempt to analyze its objective components discretely from its subjective components fundamentally flawed.[5]

I. BACKGROUND

Authors of original works are entitled to copyright protection under federal law.[6] Copyright protection extends to many types of works, including literary works, music, and architecture.[7] A copyright holder has certain exclusive rights granted by the Copyright Act of 1976.[8] The

[1] These facts are based on *Swirsky v. Carey*, 376 F.3d 841 (9th Cir. 2004).

[2] *Infra* Part I.B.

[3] *Infra* Part I.

[4] *Infra* Part II.

[5] *Infra* Part III.

[6] *See* Copyright Act of 1976, 17 U.S.C. § 106 (2000) (granting protection to copyright holders).

[7] *Id.* § 102(a)(1)-(8).

[8] *Id.* § 106(1)-(6).

first of these exclusive rights is the right of reproduction.[9] Often considered the most important, this right entitles copyright owners to prevent unauthorized copying of their copyrighted works.[10] A violation of this right constitutes copyright infringement.[11]

A. The Elements of Copyright Infringement

On a basic level, there are two elements of copyright infringement.[12] The first element is the plaintiff's ownership of a valid copyright.[13] The second element has two components.[14] First, the plaintiff must show that the defendant actually, physically copied the plaintiff's work.[15] Second, the plaintiff must show that such copying was improper because it was of elements under copyright protection.[16] To successfully establish a case for copyright infringement, the plaintiff must show both of these elements.[17]

Though these elements of copyright infringement are distinguishable in theory, they are often muddled in practice.[18] Courts have been inconsistent with the terminology they have employed.[19] Adding to the confusion, evidence used to prove actual copying overlaps with the

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[9] *Id.* § 106(1).

[10] *Id.*; *see* Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 799 (9th Cir. 2003) (finding copyright owner has exclusive right to reproduce work); Kelly v. Arriba Soft Corp., 336 F.3d 811, 817 (9th Cir. 2003) (noting copyright owner's exclusive right of reproduction).

[11] 17 U.S.C. § 501(a) ("Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright or right of the author. . . .").

[12] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991); Stromback v. New Line Cinema, 384 F.3d 283, 293 (6th Cir. 2004); Yankee Candle Co. v. Bridgewater Candle Co., 259 F.3d 25, 33 (1st Cir. 2001); 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01 (1963) ("Reduced to most fundamental terms, there are only two elements necessary to the plaintiff's case in an infringement action: ownership of the copyright by the plaintiff and copying by the defendant.").

[13] *See* sources cited *supra* note 12.

[14] Repp v. Lloyd Webber, 132 F.3d 882, 889 (2d Cir. 1997); Triad Sys. Corp. v. Se. Express Co., 64 F.3d 1330, 1335 (9th Cir. 1995); Laureyessens v. Idea Group, 964 F.2d 131, 140 (2d Cir. 1992).

[15] *See* sources cited *supra* note 14.

[16] *See* sources cited *supra* note 14.

[17] *See* sources cited *supra* notes 12, 14.

[18] *See, e.g.*, Kamar Int'l, Inc. v. Russ Berrie & Co., 657 F.2d 1059, 1062-63 (9th Cir. 1981) (treating what some refer to as "probative similarity" as "substantial similarity"); *see Lloyd Webber*, 132 F.3d at 889 n.1 ("Copyright caselaw has caused considerable confusion by the use of the term 'substantial similarity' at two different points of the copyright infringement analysis."); *Laureyessens*, 964 F.2d at 140 (discussing potential for unnecessary confusion due to terminology).

[19] *See* cases cited *supra* note 18.

evidence used to prove copying of protected material.[20] Plaintiffs can use evidence of substantial similarity between two works directly to show improper appropriation, and they can use such evidence circumstantially to show actual copying.[21] Because direct evidence of actual copying in music infringement cases is typically scant, plaintiffs must often rely on circumstantial evidence.[22] Confused terminology and evidence used for different purposes have led circuit courts to establish different tests for copyright infringement, despite a general prima facie case.[23]

B. The Ninth Circuit Test for Copyright Infringement

Purportedly, the Ninth Circuit employs a two-part test for determining copyright infringement.[24] This test consists of an extrinsic portion and an intrinsic portion.[25] Under the extrinsic portion, if the plaintiff, the copyright holder, fails to show sufficient similarity between her song and the defendant's song, the court will grant the defendant's motion for summary judgment.[26] If, however, the plaintiff can prove that

[20] Metcalf v. Bochco, 294 F.3d 1069, 1072 (9th Cir. 2002); Smith v. Jackson, 84 F.3d 1213, 1218 (9th Cir. 1996); Cottrill v. Spears, No. CIV. A.02-3646, 2003 WL 21223846, at *6 (E.D. Pa. May 22, 2003).

[21] Stromback v. New Line Cinema, 384 F.3d 283, 293 (6th Cir. 2004); Murray Hill Publ'ns, Inc. v. Twentieth Century Fox Film Corp., 361 F.3d 312, 316 (6th Cir. 2004); Ellis v. Diffie, 177 F.3d 503, 506 (6th Cir. 1999); Hoch v. Mastercard Int'l Inc., 284 F. Supp. 2d 1217, 1220 (D. Minn. 2003).

[22] Positive Black Talk, Inc. v. Cash Money Records, Inc., 394 F.3d 357, 367-68 (5th Cir. 2004) (noting that direct evidence is rarely available, so courts can infer factual copying circumstantially); Three Boys Music Corp. v. Bolton, 212 F.3d 477, 481 (9th Cir. 2000) ("Absent direct evidence of copying, proof of infringement involves fact-based showings that the defendant had 'access' to the plaintiff's work and that the two works are 'substantially similar.'"); M. Fletcher Reynolds, Selle v. Gibb *and the Forensic Analysis of Plagiarism*, 32 C. MUSIC SYMP. 55, 59 (1992) ("[P]lagiarism is rarely witnessed, and so the requisite evidence of copying is necessarily circumstantial.").

[23] *See Stromback*, 384 F.3d at 294 (acknowledging that Sixth Circuit uses two-part test for copyright infringement similar to Ninth Circuit's test, but maintaining that there are significant differences between two tests); *Metcalf*, 294 F.3d at 1073 (employing two-part test to determine whether two works are substantially similar); *Bolton*, 212 F.3d at 485 (using two-part test made up of intrinsic portion and extrinsic portion).

[24] *See* Swirsky v. Carey, 376 F.3d 841, 845 (9th Cir. 2004) (employing two-part extrinsic and intrinsic test analysis to determine substantial similarity); *Metcalf*, 294 F.3d at 1073 (employing two-part analysis to determine substantial similarity); *Bolton*, 212 F.3d at 485 (proving substantial similarity through two-part extrinsic and intrinsic test); Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042, 1045 (9th Cir. 1994) (applying two-part extrinsic and intrinsic test to compare similarities of two works).

[25] *See* cases cited *supra* note 24.

[26] *See* cases cited *supra* note 24.

the defendant's song is sufficiently similar to the plaintiff's song, the court will then consider the two works under the intrinsic test.[27] Despite extensive jurisprudential and scholarly analysis, this two-part test remains unclear.[28]

1. The Extrinsic Test

In determining whether two works are substantially similar, the extrinsic test looks to objective criteria.[29] Objective criteria often require expert testimony and analytical dissection of a work.[30] The type of objective criteria courts use depends on the type of work under investigation.[31] Courts analyze plot-based works like books, films, and television shows in terms of a discrete number of elements such as "plot, themes, dialogue, mood, setting, pace, characters, and sequence of events."[32] Structuring their analysis around these distinct elements,

[27] *See Stromback*, 384 F.3d at 294 (noting that Ninth Circuit considers only extrinsic test for purposes of summary judgment); *Swirsky*, 376 F.3d at 845 (considering only extrinsic test in denying summary judgment); *Metcalf*, 294 F.3d at 1073 (noting that only extrinsic test is relevant for purposes of summary judgment and intrinsic test is relevant later); *Bolton*, 212 F.3d at 485 (asserting that fact-finder applies intrinsic test once extrinsic test is satisfied); Smith v. Jackson, 84 F.3d 1213, 1218 (9th Cir. 1996) (pointing out that courts apply intrinsic test only if plaintiff satisfies extrinsic test); *Kouf*, 16 F.3d at 1045 (considering only extrinsic test in determining appropriateness of summary judgment); Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1475 (9th Cir. 1992) (finding that plaintiff must first satisfy extrinsic test before court will apply intrinsic test).

[28] *See* Positive Black Talk, Inc. v. Cash Money Records, Inc., 394 F.3d 357, 374 n.13 (5th Cir. 2004) (finding that jurisprudence is not clear regarding how much dissection should take place for extrinsic portion of Ninth Circuit's substantial similarity test); John R. Autry, *Toward a Definition of Striking Similarity in Infringement Actions for Copyrighted Musical Works*, 10 J. INTELL. PROP. L. 113, 118-40 (2002) (discussing courts' distinctions between similarity standards in copyright infringement); Aaron Keyt, *An Improved Framework for Music Plagiarism Litigation*, 76 CAL. L. REV. 421, 429-38 (1988) (criticizing prevailing tests for substantial similarity); B. MacPaul Stanfield, Note, *Finding the Fact of Familiarity: Assessing Judicial Similarity Tests in Copyright Infringement Actions*, 49 DRAKE L. REV. 489, 490-92 (2001) (illustrating confusion arising out of different substantial similarity tests).

[29] Kohus v. Mariol, 328 F.3d 848, 857 (6th Cir. 2003) (finding that expert testimony will typically be necessary to educate lay people about specialized issues); *Bolton*, 212 F.3d at 485 ("The extrinsic test often requires analytical dissection of a work and expert testimony."); Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435, 1442-43 (9th Cir. 1994) (noting that court will use "analytic dissection, and, if necessary, expert testimony" for extrinsic test).

[30] *See* cases cited *supra* note 29.

[31] *See infra* notes 32-37 (discussing objective criteria used for different types of works).

[32] *Kouf*, 16 F.3d at 1045; *see Swirsky*, 376 F.3d at 849 (distinguishing analysis of music from discretely classified analysis of literary works); Murray Hill Publ'ns, Inc. v. Twentieth Century Fox Film Corp., 361 F.3d 312, 317 (6th Cir. 2004) (referring to discrete elements for analyzing certain copyrightable works).

courts determine whether one literary work is substantially similar to another.[33]

On the other hand, music is not so easily compartmentalized.[34] At least one court has argued that it cannot delineate music, software programs, and art objects into a similarly manageable number of elements.[35] Consequently, courts might choose to analyze these works without a set formula.[36] The type of work at issue thus helps dictate the type of analysis the court will employ for the extrinsic test.[37]

Furthermore, the type of work at issue also helps dictate the extent to which expert testimony is useful or necessary.[38] Experts can be indispensable in educating the fact-finder about a particular medium, especially with respect to its copyrightable and uncopyrightable components.[39] Whether a complex or technical work, such as a computer program, is substantially similar to another computer program will likely require expert testimony.[40] Because lay people are typically unfamiliar with the standard practice for creating computer programs, they are unlikely to know whether two computer programs are substantially similar.[41] Whether a popular screenplay aimed at the general public is substantially similar to another such work, however, seldomly necessitates expert testimony.[42] Lay people are customarily

[33] *See* Shaw v. Lindheim, 919 F.2d 1353, 1356-57 (9th Cir. 1990) (using factors to determine similarity between television pilot scripts); Berkic v. Crichton, 761 F.2d 1289, 1292 (9th Cir. 1985) (using factors to analyze similarity between screen treatment and book); Litchfield v. Spielberg, 736 F.2d 1352, 1356 (9th Cir. 1984) (comparing musical play with motion picture using factors); cases cited *supra* note 32.

[34] Charles M. Carroll, *Musical Borrowing — Grand Larceny or Great Art?*, 18 C. MUSIC SYMP. 1, 12 (1978) ("Perhaps a literary idea can be more easily reworked and camouflaged, while in music a theme is a theme is a theme.").

[35] *Swirsky*, 376 F.3d at 849.

[36] *See supra* notes 34-35 and accompanying text.

[37] *See supra* notes 32-35 and accompanying text.

[38] *See infra* notes 39-44 and accompanying text.

[39] *Swirsky*, 376 F.3d at 848-49 ("[Expert testimony] informs the fact-finder of some of the complexities of the medium in issue while guiding attention toward protected elements and away from unprotected elements of a composition.").

[40] Stromback v. New Line Cinema, 384 F.3d 283, 295 (6th Cir. 2004); *see, e.g.*, Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435, 1443 (9th Cir. 1994) (stating that court may use expert testimony if necessary to determine similarity); Sega Enter. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1526 (9th Cir. 1992) (relying on expert testimony for analysis of video games).

[41] *See* Walter A. Effross, *Assaying* Computer Associates v. Altai*: How Will the 'Golden Nugget' Test Pan Out?*, 19 RUTGERS COMPUTER & TECH. L.J. 1, 23 (1993) (noting that computer programs are unfamiliar to "most members of the public").

[42] *See Stromback*, 384 F.3d at 295 (finding expert testimony seldom necessary to compare literary works aimed at general audience).

familiar with popular movies, so they will arguably have little difficulty comparing two of them.[43] Because lay people have varying familiarity with different copyrightable materials, the need for expert testimony varies as well.[44]

2. The Intrinsic Test

If the extrinsic test for substantial similarity between the two works is satisfied, the next step is to apply the intrinsic test for substantial similarity.[45] Thus, a court only reaches the intrinsic test if the plaintiff can show enough similarity between the two works to meet the extrinsic test threshold.[46] At this second step, the fact-finder determines how an ordinary lay listener would characterize the level of similarity between the songs.[47] The plaintiff must satisfy both the extrinsic test and the intrinsic test to prevail in a music copyright infringement case.[48]

C. The Admissibility of Expert Testimony

To meet the extrinsic test in music infringement suits, plaintiffs typically rely on expert testimony to establish substantial similarity.[49] Expert testimony is admissible if such specialized knowledge will assist the trier of fact in understanding the evidence.[50] Expert testimony can

[43] NAT'L ENDOWMENT FOR THE ARTS, READING AT RISK: A SURVEY OF LITERARY READING IN AMERICA 5 (2004), *available at* http://www.nea.gov/pub/ReadingAtRisk.pdf (reporting that 60% of U.S. population goes out to movies).

[44] *See Swirsky*, 376 F.3d at 848-49 (acknowledging need for expert testimony for "some of the complexities of the medium in issue"); Nichols v. Universal Pictures Corp., 45 F.2d 119, 123 (2d Cir. 1930) (quoting Judge Learned Hand that "the more the court is led into the intricacies of dramatic craftsmanship, the less likely it is to stand upon the firmer, if more naïve, ground of its considered impressions upon its own perusal"); Reynolds, *supra* note 22, at 58.

[45] *See* cases cited *supra* note 27.

[46] *See* cases cited *supra* note 27.

[47] Positive Black Talk, Inc. v. Cash Money Records, Inc., 394 F.3d 357, 374 n.13 (5th Cir. 2004) (describing intrinsic test as subjective jury determination); Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000) (describing intrinsic test as subjective determination made by ordinary lay person); Smith v. Jackson, 84 F.3d 1213, 1220 (9th Cir. 1996) (describing intrinsic test as degree of similarity found by ordinary lay listener).

[48] *See* cases cited *supra* note 27.

[49] *See, e.g.*, *Swirsky*, 376 F.3d at 845 (relying on musicologist's testimony to establish substantial similarity between pop songs); *Positive Black Talk*, 394 F.3d at 376 (using expert testimony to determine substantial similarity between rap songs); Cottrill v. Spears, No. CIV.A.02-3646, 2003 WL 21223846, at *6 (E.D. Pa. May 22, 2003) (using expert testimony to determine substantial similarity between pop songs).

[50] FED. R. EVID. 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a [qualified

elucidate complex material, helping the trier of fact understand the facts at issue.[51] Experts may even offer opinion testimony of which the expert has no personal knowledge so long as such testimony assists the trier of fact.[52] The inclusion or exclusion of expert testimony is critical, as it is often dispositive of the outcome.[53]

Expert testimony must meet certain standards, however.[54] The U.S. Supreme Court addressed the reliability of expert testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc*.[55] In *Daubert*, the plaintiffs sued the drug company that manufactured Bendectin to recover for injuries allegedly caused by the drug.[56] The district court granted summary judgment for the drug company, holding that the plaintiffs' expert testimony failed to reach the required standard of general acceptance.[57] The court of appeals affirmed.[58] The Supreme Court, however, reversed and remanded.[59] Abiding by the *Federal Rules of Evidence*, the Court found that scientific expert testimony is only admissible if it is reasonable and reliable.[60] The trial judge must ensure both the reasonableness and reliability of the expert testimony to admit such testimony.[61]

Though *Daubert* only extended this standard of reasonableness and reliability to scientific evidence, the Supreme Court revisited the issue in *Kuhmo Tire Company, Ltd., v. Carmichael*.[62] In *Kuhmo*, the Court held that all expert testimony, even nonscientific expert testimony, is subject to the standards of admissibility laid forth in *Daubert*.[63] Though the Court gave

expert] may testify.").

[51] Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 851 (6th Cir. 2004) (recognizing helpfulness of expert testimony).

[52] FED. R. EVID. 703 (permitting qualified expert to give opinion testimony); Hoffman v. Caterpillar, Inc., 368 F.3d 709, 713-15 (7th Cir. 2004) (allowing expert opinion testimony with respect to Americans with Disabilities Act of 1990); United States v. Ramirez, 348 F.3d 1175, 1181-82 (10th Cir. 2003) (finding law enforcement agent qualified to offer opinion testimony as expert).

[53] Reynolds, *supra* note 22, at 58 (finding that "[i]n complex or unfamiliar matters on which the jury has no base of knowledge, expert testimony can be decisive" so "the jury verdict may well turn on the relative credibility of the experts and the experts' ability to make their reasoning accessible to the layman").

[54] *See* case cited *infra* note 632.

[55] 509 U.S. 579 (1993).

[56] *Id.* at 579.

[57] *Id.* at 583.

[58] *Id.* at 584.

[59] *Id.*

[60] *Id.* at 589.

[61] *Id.*

[62] 526 U.S. 137 (1999).

[63] *Id.* at 147.

trial judges considerable discretion in determining whether expert testimony is reasonable and reliable, *Kuhmo* requires that all expert testimony meet this standard.[64]

II. *SWIRSKY V. CAREY*

Relying heavily on expert testimony, the plaintiffs in *Swirsky v. Carey* sought to prove copyright infringement.[65] Plaintiffs Seth Swirsky and Warryn Campbell (collectively "Swirsky") brought suit against Mariah Carey and others (collectively "Carey") for copyright infringement.[66] Carey's song, *Thank God I Found You*, allegedly infringed on Swirsky's copyright in the song *One of Those Love Songs*.[67]

Swirsky presented expert testimony from Dr. Robert Walser, chair of the Musicology Department at the University of California at Los Angeles.[68] Dr. Walser parsed out the two songs and compared them.[69] Among other factors, he considered their respective pitch sequences, basslines, melodies, measure structures, choruses, and rhythms.[70] Despite Dr. Walser's consideration of a broad array of musical features, the district court found, and the Ninth Circuit agreed, that Dr. Walser's methodology was selective.[71] Dr. Walser discounted, for example, the particular notes he determined to be ornamental.[72] In part because Dr. Walser's testimony was selective, Carey claimed that Swirsky failed to show substantial similarity between the two songs under the extrinsic test.[73]

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[64] *Id.* at 147-50.

[65] *See* Swirsky v. Carey, 376 F.3d 841, 843 (9th Cir. 2004).

[66] *Id.* at 843-44.

[67] *Id.* at 843; *see also* Columbia Law School Arthur W. Diamond Law Library Music Plagiarism Project, *Swirsky v. Carey* Referenced Case Webage, http://www.ccnmtl.columbia.edu/projects/law/library/cases/case_swirskycarey.html (last visited Mar. 20, 2006) [hereinafter Plagiarism Project] (providing audio recordings of musical works at issue in *Swirsky*).

[68] *See Swirsky*, 376 F.3d at 845-50.

[69] *Id*. at 846; Robert Walser, Expert Report of Robert Walser (2000) (on file with author).

[70] *Swirsky*, 376 F.3d at 846; Walser, *supra* note 69.

[71] Swirsky v. Carey, 226 F. Supp. 2d 1224, 1229-32 (C.D. Cal. 2002), *rev'd*, *Swirsky*, 376 F.3d at 841 ("The district court is correct that Dr. Walser's methodology is 'selective,' inasmuch as it discounts notes that he characterizes as 'ornamental.'").

[72] *Swirsky*, 376 F.3d at 846 (pointing out that Dr. Walser notated what he determined to be structural components and did not notate what he determined to be ornamental components); Walser, *supra* note 69.

[73] *Swirsky*, 376 F.3d at 843.

Carey moved for summary judgment.[74] The district court agreed with Carey that Swirsky had not provided sufficient evidence to pass the extrinsic test.[75] Finding Dr. Walser's testimony unconvincing, the district court granted Carey's motion for summary judgment.[76]

However, the Ninth Circuit reversed the district court's grant of summary judgment.[77] According to the Ninth Circuit, the district court had rigidly attempted to compare full transcriptions of note sequences to determine whether the songs were substantially similar enough to justify moving forward with the trial.[78] Declaring this method too mechanical, the Ninth Circuit stressed that the extrinsic test's so-called objective analysis cannot mean "simply compar[ing] the numerical representations of pitch sequences and the visual representations of notes" without considering other factors.[79] Finding that Dr. Walser's testimony adequately withstood Carey's motion for summary judgment, the Ninth Circuit reversed the lower court's grant of summary judgment.[80] Despite subjective elements to Dr. Walser's analysis, the Ninth Circuit held his testimony to be sufficiently objective to comport with the Ninth Circuit's extrinsic test.[81]

III. ANALYSIS OF *SWIRSKY V. CAREY*

The Ninth Circuit relied on faulty reasoning in its reversal of the district court's grant of summary judgment.[82] First, the court misapplied Dr. Walser's expert testimony, failing to adhere to the standards for expert testimony set forth by the Supreme Court in *Kumho Tire Co., Ltd. v. Carmichael* and *Daubert v. Merrell Dow Pharmaceuticals, Inc*.[83] Second, the Ninth Circuit improperly considered subjective criteria in applying the extrinsic test, thereby deviating from its own defined terms.[84] Third, the

[74] *Swirsky*, 226 F. Supp. 2d at 1230.

[75] *Id.*

[76] *Id.* at 1234.

[77] *Swirsky*, 376 F.3d at 843.

[78] *Id.* at 847-50.

[79] *Id.* at 843 ("We conclude that the plaintiff's expert's evidence was sufficient to present a triable issue of the extrinsic similarity of the two songs, and that the district court's ruling to the contrary was based on too mechanical an application of the extrinsic test to these musical compositions.").

[80] *Id.* at 853.

[81] *Id.*

[82] *Infra* Part III.A-C.

[83] Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 147-49 (1999); Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597-98 (1993); *infra* Part III.A.

[84] *Infra* Part III.B.

court relied on an inherently incongruent two-part test for copyright infringement.[85] This test purports to discretely analyze extrinsic factors apart from intrinsic factors.[86] The very nature of music, however, necessarily precludes such separate analyses.[87] For these reasons, the court decided *Swirsky* incorrectly.

A. The Court Misapplied the Expert Testimony with Respect to the Federal Rules of Evidence

Expert testimony is admissible only if it assists the novice trier of fact in understanding unfamiliar or complex issues.[88] Thus, the issues least accessible to lay people are the issues for which expert testimony is most appropriate.[89] Conversely, the issues most accessible to lay people are the issues for which expert testimony is least appropriate.[90] With respect to music, then, the admissibility of expert testimony depends in large part on how accessible music really is to the lay person.[91]

Strangely, lay people perceive music as simultaneously accessible and inaccessible.[92] To some extent, music is highly accessible.[93] It permeates

[85] *Infra* Part III.C.

[86] *Supra* Part I.B.1.

[87] *Infra* Part III.A-C.

[88] FED. R. EVID. 702; United States v. Stokes, 388 F.3d 21, 26 (1st Cir. 2004); United States v. Diaz, 300 F.3d 66, 73 (1st Cir. 2002).

[89] *See, e.g.*, Wills v. Amerada Hess Corp., 379 F.3d 32, 41 (2d Cir. 2004) (finding that expert testimony is necessary to establish causation under Jones Act where injury has multiple potential causes); Zuzula v. ABB Power T&D Co., Inc., 267 F. Supp. 2d 703, 715-16 (E.D. Mich. 2003) (allowing expert testimony opinion as to cause of accidental electrocution); Sinaiko v. Superior Court, 19 Cal. Rptr. 3d 371, 380-81 (2004) (finding that medical expert testimony should be liberally admitted); *see* FED. R. EVID. 702.

[90] *See, e.g.*, Salem v. U.S. Lines Co., 370 U.S. 31, 36-37 (1962) (finding expert testimony unnecessary to address obvious potential naval architecture danger); United States v. Gibbs, 190 F.3d 188, 195 (3d Cir. 1999) (finding that expert testimony interpreting language that jury could easily interpret itself should have been excluded); *see* FED. R. EVID. 702 (stating that expert witnesses may assist jurors with technical or scientific matters).

[91] *See supra* notes 88-90 and accompanying text.

[92] *See* EDWIN PRÉVOST, NO SOUND IS INNOCENT 45 (1995) ("Perhaps impossible to programme, the impact of music upon the listener is not even very easy to assess."); J. Michael Keyes, *Musical Musings: The Case for Rethinking Music Copyright Protection*, 10 MICH. TELECOMM. & TECH. L. REV. 407, 421 (2004), *available at* http://www.mttlr.org/volten/Keyes.pdf (quoting philosopher Theodor Adorno who said "of 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"); Christine Lepera & Michael Manuelian, *Music Plagiarism: Notes on Preparing for Trial*, 17 ENT. & SPORTS L. 10, 11 (1999) ("[Music] lies somewhere between the easy accessibility of literary works and the technical foreign language of computer software.").

[93] NICHOLAS COOK, MUSICAL ANALYSIS AND THE LISTENER 4 (1989) (describing simultaneous accessibility and inaccessibility of music); *see infra* notes 94-97.

nearly every facet of our lives. We hear music in our homes and cars, shopping centers, dentists' offices, sports arenas, and even within our heads as we hum to ourselves.[94] We respond to music before we are born, making this art form accessible to us even at our earliest stages.[95] Not only do we hear music constantly, we also hear music directly, through one of our senses.[96] Because we experience music directly, what we hear is immediate and unfiltered.[97] In these respects, lay people feel exceptionally comfortable judging music.

Simultaneously, however, lay people perceive music as inaccessible.[98] Music is supremely ethereal.[99] The notes escape us at the same time we hear them.[100] They disappear before we have a chance to grasp them beyond the most sudden of introductions.[101] Moreover, music's terminology is often indecipherable to the lay person.[102] The symbols and notes describing the sounds are unreadable without study and practice. More so than with literary works, for example, there is a common feeling among lay people that they simply do not understand music.[103] In these respects, lay people feel inadequate judging music.[104]

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[94] AARON COPLAND, WHAT TO LISTEN FOR IN MUSIC, at vi-vii (1939) (describing increasing ubiquity of music in society); Keyes, *supra* note 92, at 423 ("[M]usic is inextricably intertwined in the daily lives of society and invades every facet of our experience.").

[95] Keyes, *supra* note 92, at 421.

[96] NICHOLAS COOK, A GUIDE TO MUSICAL ANALYSIS 1 (1987) (noting power of music to move people "involuntarily, even subliminally").

[97] *See* NED ROREM, MUSIC FROM INSIDE OUT 10 (1967) (pointing out that music has "no meaning outside itself" precisely because it is what it sounds like). Mental content about something external is not reducible to something else. JOHN R. SEARLE, THE REDISCOVERY OF THE MIND 50-51 (1992). Similarly, the experience of listening to music, insofar as it is a direct sensory perception, is not reducible to something else. *Cf. id.* ("Any attempt to reduce intentionality to something nonmental will always fail because it leaves out intentionality.").

[98] *See infra* notes 99-104.

[99] DOUGLAS MOORE, LISTENING TO MUSIC 3 (1937) (noting quick disappearance of music as heard); Keyes, *supra* note 92, at 420-21 ("More so than any other artistic endeavors, music possesses ethereal qualities that infiltrates and permeates multiple facets of our existence in a complex manner.").

[100] *See* sources cited *supra* note 99.

[101] *See* sources cited *supra* note 99.

[102] COPLAND, *supra* note 94.

[103] *Id.* at 4-5 (describing common, though author argues incorrect, belief that lay persons understand less about music than about plays or novels).

[104] *See supra* notes 99-103 and accompanying text; *cf.* MOORE, *supra* note 99, at 3 ("No art is comparable to music in the measure of superiority which the trained feel over the untrained.").

Music's dual nature makes the need for expert testimony in music infringement cases varied. Failing to adequately account for the varied need for expert testimony, the *Swirsky* court relied too heavily on expert testimony from Dr. Walser's *Expert Report of Robert Walser* ("*Walser Report*").[105] The court's reliance on the *Walser Report* consequently failed to comport with the standards set forth in *Daubert* and *Kuhmo*, requiring expert testimony to employ reasonable and reliable methodology to assist the lay person trier of fact.[106]

To an extent, the court used the *Walser Report* appropriately. Insofar as music is inaccessible, expert testimony can greatly assist the lay person.[107] Expert testimony, for example, assists lay people in determining the extent to which musical elements are sufficiently original to warrant copyright protection.[108] Appropriately then, the court used the *Walser Report* to distinguish protected elements from unprotected elements in popular music.[109] Additionally, the court used the *Walser Report* to analyze the songs within their particular genre of popular music.[110] Because expert testimony assists the trier of fact in these areas unfamiliar to lay people, the Ninth Circuit was justified in relying on the *Walser Report* to this extent.[111]

However, the court's use of expert testimony in *Swirsky* went too far. Insofar as lay people are entirely capable of listening to and assessing the similarity of music themselves, the expert testimony in *Swirsky* offered questionable assistance.[112] Such expert testimony is superfluous for

[105] Swirsky v. Carey, 376 F.3d 841, 845-47 (9th Cir. 2004); Walser, *supra* note 69.

[106] *See* Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 147-49 (1999); Daubert v. Merrell Dow Pharms, Inc., 509 U.S. 579, 597-98 (1993).

[107] *See* sources cited *supra* notes 99-104 (discussing inaccessibility of music); sources cited *infra* notes 108-110 (discussing helpfulness of expert testimony in music copyright infringement cases).

[108] FED. R. EVID. 702; *see, e.g.*, Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000) (relying on expert testimony to differentiate protectible from unprotectible elements); Repp v. Webber, 132 F.3d 882, 887 (2d Cir. 1997) (using expert testimony to prove defendant had not copied plaintiff's song).

[109] *See, e.g.*, Kohus v. Mariol, 328 F.3d 848, 853-58 (6th Cir. 2003) (finding requirement of expert testimony likely to establish which elements of particular latch design are necessary to its function); *see* Keyes, *supra* note 92, at 434 ("Music copyright claimants would be significantly hobbled by attempting to joust over whether a given piece of music is substantially similar without the aid of expert testimony." (citing Michael D. Manuelian, *The Role of the Expert Witness in Music Copyright Litigation*, 57 FORDHAM L. REV. 127, 129-30 (1988)).

[110] *Swirsky*, 376 F.3d at 847; *see also* FED. R. EVID. 702 (allowing expert testimony under limited circumstances); Walser, *supra* note 69 (providing expert testimony).

[111] *See supra* notes 107-110 and accompanying text.

[112] *See* FED. R. EVID. 402 ("Evidence which is not relevant is not admissible."); Reynolds, *supra* note 22, at 71 (noting that trier of fact must judge musical similarities "which

helping lay people decide which songs sound similar.[113] To the extent that we listen to music directly, the musicologist is in no better position to listen than the lay listener.[114] Accordingly, expert testimony as to how music sounds is of little value to lay listeners.[115]

Some argue, though, that the musicologist actually is in a better position to listen for similarity between songs than is the lay listener.[116] Because experts are perhaps more receptive to different elements of music, expert testimony arguably helps lay listeners listen.[117] Someone very familiar with various elements of musical analysis can presumably help the lay listener compare such elements.

Though experts in musicology are probably more receptive to the nuances of sounds than lay listeners are, it does not follow that experts are better prepared to compare the sounds they hear. The act of comparing whether one song sounds similar to another is largely impressionistic.[118] Lay people determine songs to be similar which strike them as similar.[119] Though perhaps unreasoned and unstudied, their determinations of similarity are no less real than their determinations of what sounds pleasing to them.[120] Furthermore, insofar as these determinations result from immediate and unfiltered data reception of music, lay people cannot be wrong about them.[121]

Moreover, expert testimony in these types of cases can disproportionately influence the fact-finder's understanding of the

necessarily exist in sound and not on printed page"); sources cited *infra* note 113.

[113] *Cf.* GROSVENOR COOPER, LEARNING TO LISTEN, at xiii (1957) (noting that "only music can teach you music," thus emphasizing role of listening to music in analyzing music and deemphasizing role of expert assistance); ROREM, *supra* note 97, at 10 (explaining that music is abstract with "no intellectual significance, no meaning outside itself," thus helping to establish directness with which lay people experience music and superfluousness of expert analysis in helping lay listeners hear similarities between songs).

[114] *See* sources cited *supra* notes 112-13.

[115] *See supra* notes 88-90 and accompanying text.

[116] COPLAND, *supra* note 94, at vi-vii (acknowledging that experienced composers are still fallible in their listening skills, though they are perhaps "better prepared to listen" than lay listeners); Reynolds, *supra* note 22, at 76 (noting that lay listeners and experts hear same data, but experts help lay listeners hear with their ears and mind).

[117] *See* sources cited *supra* note 116.

[118] *Cf.* COOK, *supra* note 93, at 7 (noting that lay listeners "enjoy music about whose technical and formal structure they know nothing"); LEONARD G. RATNER, MUSIC, THE LISTENER'S ART, at v (1957) (discussing lay listeners' ability to interpret their nontechnical impressions).

[119] *Cf.* sources cited *supra* note 118.

[120] *Cf.* SEARLE, *supra* note 97, at 112 (noting irreducibility of consciousness).

[121] *Id.* at 46-63.

evidence.[122] It is the extreme persuasiveness of expert testimony that most implicates public policy concerns. Testimony presented by an expert in the area of music might sway jurors unnecessarily.[123] Bluntly put, expert testimony's persuasiveness does not translate into its admissibility.[124] On the contrary, the fact that lay listeners are apt to acquiesce readily to such expert testimony further attests to why courts should rigorously monitor such testimony for compliance with the *Federal Rules of Evidence*. To allow anything less is to jeopardize the integrity of the evidentiary system. Despite musicologists' nuanced appreciation of music, they are no more capable of comparing whether songs sound similar than lay people are. By admitting expert testimony for these purposes, the Ninth Circuit failed to comport with the standards set forth by both the *Federal Rules of Evidence* and the Supreme Court cases, *Daubert* and *Kumho*.

B. The Court Misapplied the Expert Testimony with Respect to Its Own Extrinsic Test

Insofar as the *Walser Report* was openly and purposely selective, it failed to conform to the Ninth Circuit's extrinsic test.[125] While the extrinsic test requires objective analysis, Dr. Walser's method of analysis was unequivocally and subjectively selective.[126] He disregarded bassline notes and pitches he determined to be ornamental, as well as certain "text-setting choices" and notes he determined to be performance-related.[127] Instead, Dr. Walser's comparison of the two songs focused on

[122] *See* Lepera & Manuelian, *supra* note 92, at 17 (explaining that expert testimony is generally not allowed to help determine substantial similarity because jurors, as practical matter, "may well have difficulty not considering the expert's evidence"). *But see* Vernon W. Johnson III, *Use of Expert Testimony in Copyright Infringement Cases*, 14 INTELL. PROP. & TECH J. 8, 10 (2002) (questioning whether expertise involved in aesthetic arts cases is really available to lay person without expert guidance).

[123] Lepera & Manuelian, *supra* note 92, at 17 (noting that jurors might have difficulty disregarding expert testimony, simply as practical matter, as to substantial similarity between two songs). *But see id.* at 12 (arguing that music's ubiquity might make jurors "mistakenly believe that they are eminently qualified to determine — without the benefit of expert analysis — whether two works are alike").

[124] FED. R. EVID. 402 ("Evidence which is not relevant is not admissible.").

[125] Swirsky v. Carey, 376 F.3d 841, 846 (9th Cir. 2004) ("Dr. Walser labeled his transcription of the basslines a 'reduction' because he transcribed only the 'basic, emphasized pitches and rhythms.' Dr. Walser thus did not include any bassline notes or pitches he found to be 'ornamented' in his transcriptions.").

[126] *Id.*

[127] *Id.*

what he considered to be the "overall emphasis on musical notes."[128] In essence, his analysis was largely impressionistic.[129] He chose to disregard certain elements in order to emphasize others.[130] Thus, his analysis was selective.

This sort of "selective reduction," as Carey refers to it, is convenient in musicological contexts because it highlights the components under discussion.[131] Selective reduction is problematic in legal contexts, however, because there is no consensus as to which elements the fact-finder ought to highlight in determining substantial similarity.[132] Without a standardized methodology, musicologists can selectively reduce works in vastly different ways.[133] This artificially makes songs seem more or less similar, depending on musicologists' subjective choice of elements to highlight.[134] Unfortunately, it is not uncommon for misinformed courts to misjudge the reliability of musical methodologies.[135] Insofar as Dr. Walser subjectively emphasized certain

[128] *Id.*

[129] Plagiarism Project, *supra* note 67.

[130] *See supra* notes 125-29 and accompanying text.

[131] *See* ALASTAIR BORTHWICK, MUSIC THEORY AND ANALYSIS: THE LIMITATIONS OF LOGIC 3 (1995) ("Rather than contemplating speculative general theories of music, musicologists have tended to analyse diverse musical languages by employing correspondingly diverse theories. In fact, it is often the case that diverse or even allegedly antithetical theories have been used to analyse the same composition."); *id.* at 4 (noting "absence of a single general theory of music," and commenting on desirability of "many more analytical methods" of analyzing music); COOK, *supra* note 96, at 2 (acknowledging "large number of analytical methods" for analyzing music); *id.* at 3 (advocating use of different analytical techniques together to analyze music). *See generally* MICHAEL R. ROGERS, TEACHING APPROACHES IN MUSIC THEORY (1984) (analyzing many different music methodologies).

[132] *See* sources cited *supra* note 131. Music analysis "doesn't have a sufficiently sound theoretical basis" to even be a "quasi-scientific discipline." COOK, *supra* note 96, at 3. Consequently, there is a lack of consensus as to objective musical analysis for any discipline, including law. *Cf. id.*

[133] ROBERT COGAN, NEW IMAGES OF MUSICAL SOUND 1 (1984) ("Some traditions, most notably that of European music theory inherited in North and South America, strive to reduce the complex information of musical sounds to *notes*. Notes, however, name only one aspect of a sound: a focal pitch, if and when one exists."); *id*. (using sonic maps to analyze music); COPLAND, *supra* note 94, at 33-34 (reducing music to "four essential elements: rhythm, melody, harmony and tone color," though simultaneously acknowledging that listener is not concerned with four distinct elements, but with "the seemingly inextricable web of sound that they form").

[134] *See supra* notes 131-33 and accompanying text.

[135] Reynolds, *supra* note 22, at 58-59 ("Although a judge is usually a layman in the expert's field, he often knows something about the expert's methodology . . . . In music plagiarism cases, however, even an otherwise well-educated judge usually has little understanding of what music theorists do, and he will find no legal authority to steer his evidentiary decisions in the right direction. Quite the contrary, the sparse legal writings on music are filled with truly astonishing misinformation.").

elements, his report failed to conform to the objective limits of the extrinsic test.

C. In Light of the Nature of Music, the Court's Reliance on the Ninth Circuit Test for Copyright Infringement Was Unsound

The *Walser Report*'s failure to adhere to the extrinsic test's conditions is indicative of a systemic problem in the Ninth Circuit's test for copyright infringement. Recall that the Ninth Circuit relies on a two-part test for determining copyright infringement.[136] By definition, the extrinsic portion considers only objective criteria in determining whether two songs are substantially similar.[137] Recall also that for purposes of summary judgment, courts only consider the extrinsic portion of the test.[138] Consequently, there is a discrete division between the court's application of the extrinsic test and its application of the intrinsic test. But, as the following will show, any such attempt to wholly divide the objective from the subjective with respect to music is fundamentally flawed due to music's very nature.[139]

Music itself is nothing more than aural phenomena.[140] Undeniably, those who are musically inclined can transcribe or analyze the music they hear.[141] Those who are quite adept can use sheet music to compose.[142] But such transcriptions or written compositions are, by their very essence, secondary to the aural music.[143] Transcriptions describe the

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[136] *See supra* Part I.B.

[137] *See* cases cited *supra* note 29.

[138] *See* cases cited *supra* note 29.

[139] Keyes, *supra* note 92, at 432 ("[T]here is no accepted 'social norm' that would provide any meaningful standard to how a piece of music would be perceived by a 'reasonable listener.' In fact, music perception is an inherently subjective process that differs from individual to individual.").

[140] *See* THOMAS CLIFTON, MUSIC AS HEARD: A STUDY IN APPLIED PHENOMENOLOGY 1, 281 (1983) (suggesting that "there is no music without the presence of a human being assuming whatever stance of receptivity is needed to make sounds musical for him," and later concluding that "[t]here is no music without a presence of a 'music-ing' self"); Keyes, *supra* note 92, at 435 ("As music perception is a subjective process, there simply is no quintessential or objective way to perceive a piece of music."). *But see* COPLAND, *supra* note 94, at 16 (describing sheerly musical plane of music in which music exists "in terms of the notes themselves" in addition to "the pleasurable sound of music and the expressive feeling that it gives off").

[141] COPLAND, *supra* note 94, at 5 (acknowledging certain musicality in people who can immediately play music they hear).

[142] *See id.* at 20-32 (considering how composers compose).

[143] CLIFTON, *supra* note 140, at 298 (noting inherent limitations of "secondhand and selective account[s]" of written musical scores to denote experience of listening to music).

music; they do not constitute the music.[144]

Moreover, transcriptions are imperfect descriptions at best.[145] They only reveal so much of the actual experience of music-listening.[146] First, transcriptions can hardly capture every element of the musical piece.[147] Our own limited abilities to describe and communicate constrain the transcriptions' accuracy.[148] Second, and more importantly, transcriptions can never fully replicate the actual experience of listening precisely because that experience is uniquely aural.[149] Necessarily then, transcriptions are skewed accounts of how music sounds, however accurate they may be of specific elements.[150] Written transcriptions unavoidably distort the music by emphasizing certain elements over others.[151] Additionally, these transcriptions lack the particular aural component that makes music the very thing that it is.[152]

It is precisely how music sounds and not how one might transcribe music that is at issue in a music copyright infringement case.[153] The basis of a legitimate music copyright infringement claim is whether the

[144] *See, e.g.*, *id.* ("But to inhabit the world of music, it is necessary to be able to identify that world and refer to *it*, not its representative.").

[145] *Cf.* REROREM, *supra note* 97, at 1 (quoting Felix Mendelssohn saying, "[I]t's not that music is too imprecise for words, but too precise," thus illustrating necessary limitations of words or transcriptions to capture entire essence of music).

[146] *See infra* notes 147-52 and accompanying text.

[147] *See* COOK, *supra* note 93, at 6 ("No words or graphs can therefore be a perfect analogue of the listener's experience."); COPLAND, *supra* note 94, at 246-47 (noting musical notation is inexact).

[148] COPLAND, *supra* note 94, at 25 ("Merely by changing the dynamics, that is, by playing it loudly and bravely or softly and timidly, one can transform the emotional feeling of the very same succession of notes."); *id.* at 35 ("Even today our system of rhythmic notation is far from perfect. We still are unable to note down subtle differences such as every accomplished artist instinctively adds in performance.").

[149] *See* COGAN, *supra note* 133, at 1 ("Sound in music has for millennia proved to be inscrutable — beyond description and analysis in almost every musical tradition. As his first example of the gap that separates our knowledge from our descriptive powers, the philosopher Wittgenstein chose 'how a clarinet sounds.'" (footnote omitted)); COOPER, *supra* note 113, at xi (claiming that merely reading about music is insufficient to really understand music and will give only reader "shadowy idea of what it might be like to have a direct perception of musical process"); COPLAND, *supra* note 94, at 3 (noting that to truly understand music, "[n]othing can possibly take the place of listening to music").

[150] *See supra* notes 147-49 and accompanying text.

[151] *See supra* notes 148-49 and accompanying text.

[152] Keyes, *supra* note 92, at 434-35 ("[W]ith analysis in hand expert seeks to convince jury of objective similarities . . . then, if yes, he can help establish that those constitute improper appropriation."); Reynolds, *supra* note 22, at 71 (acknowledging that courts seem to perceive listening to music and analysis of music as separate).

[153] Arnstein v. Porter, 154 F.2d 464, 473 (2d Cir. 1946) (finding question at heart of music infringement case to be "whether defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners").

defendant took some protectible component of the plaintiff's music that is "pleasing to the ear."[154] Swirsky brought suit because Carey's song purportedly sounded similar to Swirsky's song.[155] By employing a test that fails to sufficiently take the very nature of music into account, the Ninth Circuit erred.

Critics may fairly contend, however, that the two-part test structure is particularly accommodating for efficiency reasons.[156] Deluged with baseless suits alleging copyright infringement, courts do need some way to dismiss such suits quickly and inexpensively.[157] The Ninth Circuit's two-part test allows the court to grant summary judgment for the defendant if the plaintiff fails to satisfy the extrinsic test.[158] In this way, courts can quickly dismiss meritless cases without ever sending them to a jury.[159]

Though this method has enabled courts to dismiss more suits earlier, it has hardly facilitated efficiency.[160] For one thing, dismissing suits on the basis of expert testimony has not altogether saved the resources it purportedly saved.[161] Moreover, even if exercise of this test leads to speedier resolutions, justice is not served by quickness alone.[162] Looking only to external, so-called objective criteria, courts might mistakenly dismiss cases on summary judgment that actually have merit as copyright infringement actions.[163]

At the very least, the Ninth Circuit should acknowledge what it in fact is doing when it ostensibly applies the extrinsic test in a music copyright

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[154] *Id.*

[155] Swirsky v. Carey, 376 F.3d 841 (9th Cir. 2004).

[156] *See* sources cited *supra* note 27.

[157] *See, e.g.*, Maljack Prods., Inc. v. GoodTimes Home Video Corp., 81 F.3d 881 (9th Cir. 1996) (finding plaintiff's copyright claims factually unreasonable, and awarding attorney's fees to defendant to deter future baseless suits); Wood v. Santa Barbara Chamber of Commerce, Inc., 705 F.2d 1515, 1523 (9th Cir. 1983) (enjoining relitigation of baseless copyright infringement suit); Don Post Studios, Inc. v. Cinema Secrets, Inc., 148 F. Supp. 2d 572 (E.D. Pa. 2001) (reimbursing alleged infringer for attorney's fees from copyright holder due to frivolous copyright infringement suit over Halloween mask).

[158] *See* cases cited *supra* note 27.

[159] *See* cases cited *supra* note 27.

[160] *Infra* notes 161-163 and accompanying text.

[161] *Cf.* Johnson, *supra* note 122, at 9 ("[T]he argument that the trial court abused its discretion in permitting expert testimony has been the subject of countless appeals.").

[162] *See* cases cited *infra* note 163.

[163] *See, e.g.*, Swirsky v. Carey, 376 F.3d 841 (9th Cir. 2004) (reversing dismissal on summary judgment finding sufficient similarity between songs to go forward with case); Murray Hill Publ'ns, Inc. v. Twentieth Century Fox Film Corp., 361 F.3d 312, 313-14 (6th Cir. 2004) (reversing judgment that defendant's movie was substantially similar to plaintiff's screenplay, notwithstanding expert testimony to contrary).

infringement claim. It is unacceptable for the court to realize that there is confusion, yet fail to forthrightly admit what it is doing.[164] With a mislabeled test in place, the mechanics of presenting a music copyright infringement action will become increasingly difficult. Parties will no doubt attempt to fulfill the requirements of the test as laid out. The inherent inconsistencies will thus clog court proceedings, ultimately resulting in less efficient resolution of cases. Inconsistent and, thus, unfair results will ensue.

Fairness within the courts depends on the courts' appreciation of the actual nature of music. Though describable, music is not separable.[165] Two sides to the same coin, the extrinsic and intrinsic elements of music are hardly the discretely divisible pieces required by the Ninth Circuit's two-part test.[166] Ultimately, there are no objective components of music as distinct from the experience of listening to music.[167] Even those quintessentially objective components such as the black notes on white music sheets are incomplete accounts of the real experience of hearing music.[168] Because of the aural nature of music, any attempt to discretely divide the extrinsic elements from the intrinsic elements will necessarily fail.

Having analyzed the inherent incongruity of the test, we are now in a better position to understand the fundamental trouble underlying the use of expert testimony in a music infringement case such as *Swirsky*. Because music's so-called objective elements are actually imperfect descriptions of the aural experience of listening to music, any attempt to isolate them apart from subjective elements is futile. Thus, expert testimony, insofar as it attempts to describe the extrinsic elements, will inevitably go beyond the bounds of the extrinsic test.

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[164] *Swirsky*, 376 F.3d at 843, 848 (noting that "[t]he application of the extrinsic test, which assesses substantial similarity of ideas and expression, to musical compositions is a somewhat unnatural task, guided by relatively little precedent" and that extrinsic test "provides an awkward framework to apply to copyrighted works like music or art objects, which lack distinct elements of idea and expression").

[165] *See supra* notes 140-152 and accompanying text.

[166] *See* CLIFTON, *supra* note 140, at 14-15 (noting difficulty in approaching music empirically). *See generally* COPLAND, *supra* note 94, at 19 ("A subjective and objective attitude is implied in both creating and listening to music.").

[167] CLIFTON, *supra* note 140, at ix (denouncing approaching music "the way a scientist approaches an experiment" as "an inauthentic sort of objectivity").

[168] *Id.* at 298 (illustrating that necessary precondition to "inhabit[ing] the world of music" is being able to refer to music directly as bodily experience rather than through some "secondhand and selective account").

CONCLUSION

Though music is uniquely distinct, courts have failed to treat it differently from other copyrightable materials.[169] In *Swirsky v. Carey*, the Ninth Circuit disappointingly followed this tradition. Purportedly applying the extrinsic portion of its two-part test, in actuality, the Ninth Circuit did no such thing. The expert testimony was not wholly objective or technical, nor could it ever have reliably been so. Instead, the expert testimony contained the expert's own subjective determinations.[170] These determinations, though important for resolving music copyright infringement issues, do not fall within the Ninth Circuit's definition of the extrinsic portion of its test.

Ultimately, the Ninth Circuit's two-part test for copyright infringement, as defined, is inherently incongruent as applied to music infringement cases. As discussed, the very nature of music necessarily precludes separate analysis of extrinsic components from intrinsic components. It is therefore misleading for the Ninth Circuit to have claimed to analyze the songs in this way. In purporting to follow a test which is itself paradoxically incompatible, it has muddied the waters of the extrinsic test even further.[171]

[169] Keyes, *supra* note 92, at 420 ("The first consideration that has been essentially left out of the music copyright calculus in both congressional and judicial spheres is the important distinction between music and other art forms." (footnotes omitted)); *id.* at 410 ("In looking at the development of music copyright law, it is evident that both Congress and the courts have historically treated music just like other types of works of authorship, and, consequently have approached the legal issues of protection and infringement of music like those other types. While this like-treatment rationale may have had a superficial appeal in days gone by, sociological and technological changes, as well as a survey of the historical practices of the music composition process, challenge the efficacy of this 'one-size-fits-all' formulation.").

[170] Walser, *supra* note 69.

[171] Metcalf v. Bochco, 294 F.3d 1069, 1071 (9th Cir. 2002) (referring to extrinsic test as "turbid waters").