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## ***Juror Responses to Music Copyright's Lay Listener Test***

ABSTRACT: Music recordings consist of two distinct copyright protections: (1) a copyright in the underlying composition (the “Composition Copyright”) and (2) a copyright in the sound recording (the “Recording Copyright”). The most popular test for Composition Copyright infringement, the Lay Listener Test, conflates the two by having jurors listen to sound recordings. Playing the sound recording in a Composition Copyright case invites the jurors to make the wrong comparison, comparing the sound recordings, rather than the compositional elements underlying each recording. To test this potential for prejudice, an experiment was conducted replicating the Lay Listener Test in a controlled setting. Experiment participants were presented two pairs of music from actually litigated composition infringement cases. The participants were asked to assess the similarity of the allegedly infringing compositions as would jurors performing the Lay Listener Test. One set of participants heard the songs performed similarly, i.e. same timbre, orchestration, tempo, key, and style. The other participants heard the identical compositions but performed differently, i.e. different timbre, orchestration, tempo, key, and style. Participants consistently rated compositions performed similarly as being more compositionally similar than identical compositions played dissimilarly, suggesting that the Lay Listener Test introduces prejudicial elements into the jury’s determination of substantial similarity. The audio clips can be found at [jlundlaw.com](http://jlundlaw.com).