Is the Lay Audience Real or Fake?

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Since the seminal case *Arnstein v. Porter* set forth in 1946 the test for copyright infringement, also known as the substantial similarity test, courts have examined whether infringement occurred from the perspective of the ordinary lay audience. Courts have also recognized that alleged copying that "the average [lay] audience would not recognize" is *de minimis* and non-infringing. And "copying which is infringement must be something which ordinary observations would cause to be recognized as having been taken from the work of another."

Yet, in practice, there is nothing ordinary about the determination of infringement. Instead, jurors (or judges) often receive expert testimony dissecting discrete elements of works, such as songs, that were allegedly copied. And, even without expert testimony, the copyright holders inevitably direct the jury's attention to the putative copied similarities of the defendant's work. An assumption of how copyright infringement is determined is that telling the jurors what the alleged similarities are enables them to make a true assessment of how a lay audience would view them. This Article investigates this assumption through a behavioral experiment. It tests whether lay people find two works substantially similar more often when they are told what the putative similarities are. Our hypothesis is that lay people do find substantial similarity more often due to having received such information or prompting. If the results bear out our hypothesis, we question whether this prompt-based determination of substantial similarity truly reflects a lay audience—or instead merely a *litigation* audience. Indeed, if our hypothesis is correct, we may suggest something sacrilegious—that *Arnstein v. Porter's* test is wrong and should be overruled in favor of an infringement test designed to examine what ordinary lay audiences actually perceive.