

# FINDING THE FACT OF FAMILIARITY: ASSESSING JUDICIAL SIMILARITY TESTS IN COPYRIGHT INFRINGEMENT ACTIONS

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## I. INTRODUCTION: LADIES AND GENTLEMEN, IRA B. ARNSTEIN

Ira B. Arnstein considered himself an accomplished and successful songwriter.<sup>1</sup> He also believed plagiarists had deprived him of the rewards of his talent by infringing upon the copyrights to his compositions to their personal aggrandizement.<sup>2</sup> To redress these wrongs, Arnstein sued the allegedly offending com-

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1. See *Arnstein v. Porter*, 154 F.2d 464, 467 (2d Cir. 1946). Arnstein testified on deposition that his composition "A Mother's Prayer" sold over a million copies. *Id.* But see JOSEPH MURRELS, MILLION SELLING RECORDS FROM THE 1900S TO THE 1980S: AN ILLUSTRATED DIRECTORY 509, 524 (1st ed. 1984) (lacking any mention of Ira B. Arnstein or "A Mother's Prayer" as a million selling record).

2. See, e.g., *Arnstein v. Porter*, 154 F.2d at 467 (alleging \$1,000,000 in damages from Cole Porter for plagiarizing multiple compositions); *Violinists Play in Court for Judge*, N.Y. TIMES, June 4, 1935, at 26 (reporting Arnstein's suit against Emery Deutsch and Marks Publishing Co., for plagiarizing "I Love You Madly" with "Play, Fiddle, Play") [hereinafter *Violinists*]. Arnstein failed in his bid to collect \$250,000 in damages from Emery Deutsch and Marks Publishing Co. *No Song*

posers and the publishing houses that profited from the infringing compositions.<sup>3</sup> Once in court, Arnstein, usually appearing pro se,<sup>4</sup> set out to prove infringement through a demonstration of how similar the defendants' compositions were to his own.<sup>5</sup> His method was rich in common sense as he would simply ask the court to listen and compare the compositions in question.<sup>6</sup> In his 1935 action against Emery Deutsch, Arnstein brought before the court two violinists who performed Arnstein's "I Love You Madly" and the offending "Play, Fiddle, Play."<sup>7</sup> Four years later, in a suit against multiple defendants, Arnstein himself sat down at a piano and offered his renditions of the compositions in question, reportedly exclaiming: "You see . . . It's the same language."<sup>8</sup>

Proving that one creative work is not only similar to another, but so similar as to constitute copyright infringement, has proven to be much more complicated than simply sitting down at a piano and playing two songs. Attorney and author Louis Nizer described proving similarity as a "fearful task" and a significant reason why "plagiarism suits are almost always lost."<sup>9</sup> Nonetheless, plaintiffs file lawsuits alleging copyright infringement, and courts must determine the most effective means to divine the similarity between one work and another. Recent decisions illustrate the confusing array of similarity tests courts have employed in the adjudication of copyright infringement actions.<sup>10</sup>

In 1998, the Second Circuit Court of Appeals upheld a lower court decision finding that Carol Publishing Group's *Seinfeld Aptitude Test* trivia quiz book infringed on Castle Rock Entertainment's copyright of each episode of the television series *Seinfeld*.<sup>11</sup> The court applied a two-component test for infringement in which each component relied upon a finding of similarity between the works

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*Theft Is Found*, N.Y. TIMES, June 15, 1935, at 20. See also *Loses Again*, BILLBOARD, Jan. 29, 1949, at 15 (reporting dismissal of Arnstein's "omnibus suit against Crestview Music, American Society of Composers, Authors & Publishers (ASCAP), Sigmund Spaeth, Leeds Music, Louis D. Frolich, Herman Finkelstein, Irving Berlin, A.B.C. Music, Bourne, BVC and others"); *Song Writer Plays Piano for Court*, N.Y. TIMES, Mar. 7, 1939, at 18 (reporting Arnstein's lawsuit against "the National Broadcasting Company, Warner Brothers Pictures Company, Witmark & Sons, Harms, Inc., E. D. Marks, Sam Parks and Mills Music Company" for piracy and infringement) [hereinafter *Song Writer*]. *Billboard* reported that Justice Felix Benvenga held Arnstein's pleading was "vague and indefinite" and "pleaded insuch [sic] a manner as to make it unsafe to plead to it." *Loses Again*, *supra*, at 15.

3. See *supra* note 2.

4. See *Arnstein v. Porter*, 154 F.2d at 468; *Song Writer*, *supra* note 2, at 18.

5. See *Violinists*, *supra* note 2, at 26; *Song Writer*, *supra* note 2, at 18.

6. See *Violinists*, *supra* note 2, at 26; *Song Writer*, *supra* note 2, at 18.

7. *Violinists*, *supra* note 2, at 26.

8. *Song Writer*, *supra* note 2, at 18.

9. LOUIS NIZER, MY LIFE IN COURT 266 (Pyramid Books 1963).

10. See *infra* notes 11-17 and accompanying text.

11. *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 135 (2d Cir. 1998).

in question.<sup>12</sup> The court found the "quantitative/qualitative" approach to evaluating similarity preferable to either the "ordinary observer," "total concept and feel," or "fragmented literal similarity" tests.<sup>13</sup> One year later, the Sixth Circuit Court of Appeals upheld a lower court determination that Joe Diffie's composition "Prop Me Up Beside the Jukebox (If I Die)" did not infringe upon Everett Ellis' song "Lay Me Out by the Jukebox When I Die."<sup>14</sup> In its assessment of similarity between the two songs, the court relied upon the "ordinary observer" or audience test and declined to adopt the extrinsic and intrinsic analysis.<sup>15</sup> The Ninth Circuit, meanwhile, upheld the use of extrinsic and intrinsic analysis for proving similarity when it affirmed a finding of infringement upon copyrights owned by Dr. Seuss Enterprises.<sup>16</sup>

As the examples offered in the preceding paragraph suggest, there are plenty of opportunities for confusion when attempting to prove similarity. Not only are there multiple tests from which courts may choose, but there are also multiple elements requiring proof of similarity. The Second Circuit Court of Appeals cautioned:

[C]are must be taken to recognize that the concept of "substantial similarity" itself has unfortunately been used to mean two different things. On the one hand, it has been used as the threshold to determine the degree of similarity that suffices, once access has been shown, as indirect proof of copying; on the other hand, "substantial similarity" is more properly used, after the fact of copying has been established, as the threshold for determining that the degree of similarity suffices to demonstrate actionable infringement.<sup>17</sup>

Further, all of these factors may vary from one jurisdiction to the next.<sup>18</sup> But while there appears to be an ever-present potential for confusion regarding the

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12. *Id.* at 137 (requiring probative similarity to establish the element of copying and substantial similarity to establish the second component, unlawful copying). See discussion *infra* Parts III, V (exploring the elements of copyright infringement and the emergence of the probative similarity element).

13. *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d at 139-40. See generally discussion *infra* Part II (discussing various similarity tests).

14. *Ellis v. Diffie*, 177 F.3d 503, 507 (6th Cir. 1999).

15. *Id.* at 506 & n.2. See generally discussion *infra* Part II (exploring various similarity tests).

16. *Dr. Seuss Enters. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1398 (9th Cir. 1997) (finding that Penguin Books infringed on the copyright for *The Cat in the Hat* by publishing a Seussian telling of the O.J. Simpson trial entitled *The Cat NOT in the Hat!*). See also discussion *infra* Part III.D (discussing the extrinsic and intrinsic similarity test).

17. *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997).

18. See, e.g., *Ellis v. Diffie*, 177 F.3d at 506 & n.2 (noting the "ordinary observer" test requires evaluating the similarities of the two works on the basis of a net impression without reliance on expert analysis); *Dr. Seuss Enters. v. Penguin Books USA, Inc.*, 109 F.3d at 1398

proper application of one or more of the various similarity tests, it does not necessarily follow that this mélange of legal terminology actually impedes a plaintiff's ability to prove similarity. A plaintiff alleges infringement based on a personal perception the infringing work is similar and attempts to demonstrate that perception to the court. If the court agrees the works are similar, then the question might be whether the court came to its conclusion through the application of a test or merely used a test to explain the perceived similarity.

This Note examines the tests courts use to discern, or explain, similarity in the adjudication of copyright infringement actions involving works created for popular entertainment. Part II offers a brief discussion of the sources of copyright law and the elements required for establishing copyright infringement. Part III discusses some of the various similarity tests courts have employed and reports the current split among the circuit courts. Part IV follows with a discussion of situations when proof of similarity fails to establish infringement because the copyright does not protect that which the court finds to be similar or the court deems the similarity to be trivial. Lastly, Part V presents recent scholarly writings proposing to bring clarity and consistency to the judicial determination of similarity.

## II. SOURCES OF COPYRIGHT LAW

### A. *The Constitution and Statutory Provisions*

Article I, section 8 of the United States Constitution gives the federal government authority over copyright law.<sup>19</sup> The Constitution empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>20</sup> From this authority, Congress extends copyright protection to "original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."<sup>21</sup> Congress grants only to the copyright holder the exclusive rights to enumerated uses of the copyrighted work pertaining to reproduction, distribution, and public performances and displays of the work.<sup>22</sup>

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(stating "[m]ost courts have used some form of bifurcated test to demonstrate 'substantial similarity,' inquiring first if there is copying and second if an audience of reasonable persons will perceive substantial similarities . . ."); *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d at 75 (stating the "substantial similarity" question requires quantitative and qualitative evaluations).

19. U.S. CONST. art. I, § 8, cl. 8.

20. *Id.*

21. 17 U.S.C. § 102(a) (1994).

22. *Id.* § 106.

The primary purpose of copyright legislation, however, is not to benefit the author, but rather the public.<sup>23</sup> The protection of the work granted to the author is considered a "bonus" intended to "stimulate writing and invention."<sup>24</sup> To achieve the constitutional aspirations of promoting science and the useful arts, copyright legislation "assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."<sup>25</sup> Thus, the statute limits copyright protection to expressions of ideas only and prohibits the extension of protection "to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work."<sup>26</sup>

The dichotomy between idea and expression plays a critical role in the determination of copyright infringement and also exemplifies the dual inquiries that typically underlie determinations of similarity. The first inquiry is the question of what is similar between two works. For example, the granting of a copyright "does not preclude others from using the ideas or information revealed by the author's work."<sup>27</sup> Simply put, a copyright will not protect an idea. Therefore, if the only similarity between two works is that they share a common idea, there is no copyright infringement.<sup>28</sup> For instance, one could not protect by copyright the idea of an animated duck with a funny voice. Thus, neither Donald Duck<sup>29</sup> nor Daffy Duck<sup>30</sup> is an infringement upon the copyright of the other. A suit by Disney against Warner would likely fail because *what* is similar between the two works is the idea, not the expression.<sup>31</sup> Copyright protection, however, does extend to the expressions of the idea in the forms of both Donald and Daffy.<sup>32</sup> If Daffy were to start wearing a blue sailor's suit and dye his feathers white, the expressions of the idea would, arguably, become similar. At that point, a second inquiry arises and the critical issue is *how* similar the two expres-

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23. See ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT FOR THE NINETIES: CASES AND MATERIALS 15 (4th ed. 1993) (citing H.R. REP. NO. 60-2222, at 7 (1909)).

24. *Id.* (citing H.R. REP. NO. 60-2222, at 7 (1909)).

25. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349-50 (1991).

26. 17 U.S.C. § 102(b).

27. GORMAN, *supra* note 23, at 14.

28. See *Black v. Gosdin*, 740 F. Supp. 1288, 1290 (M.D. Tenn. 1990) ("It is clear that the allegedly infringing song conveys the same idea or theme as plaintiff's song. However, '[i]deas are not protected by copyright, only expressions of ideas.'" (citations omitted)).

29. The Walt Disney Company holds the copyright for the character Donald Duck. See *Walt Disney Co. v. Powell*, 897 F.2d 565, 566 (D.C. Cir. 1990).

30. Time Warner Entertainment Company owns the copyright for the character Daffy Duck. See *Time Warner Entm't Co. v. Does # 1-2*, 876 F. Supp. 407, 408-09 (E.D.N.Y. 1994).

31. See 17 U.S.C. § 102(b).

32. See *id.*; see also *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) (discussing that "a subsequent compiler remains free to use the facts contained in another publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement.").



sions are to one another; do they cross a threshold of similarity that constitutes copyright infringement?

B. *Copyright Infringement and Arnstein v. Porter*<sup>33</sup>

In a strange bit of irony, it is within American jurisprudence and not popular music that the name of Ira Arnstein reverberates. While he has fallen into obscurity among the pantheon of American songwriters, Ira Arnstein's name stands atop the "legendary" decision that legal scholar Alan Latman identified as "the most instructive guide to proving infringement."<sup>34</sup> The *Arnstein v. Porter* decision was the result of Ira Arnstein's copyright infringement suit against Cole Porter.<sup>35</sup> In that suit, Arnstein sought "at least one million dollars out of the millions [Porter had] earned . . . [from] the plagiarism."<sup>36</sup> The trial court granted Porter's motion for summary judgment and denied Arnstein's jury demand.<sup>37</sup> The circuit court modified the decision in part and reversed and remanded the rest.<sup>38</sup>

In writing for the majority, Judge Clark identified two primary elements that a plaintiff must satisfy to establish a claim for copyright infringement.<sup>39</sup> The first element is "that the defendant copied from [the] plaintiff's copyrighted work."<sup>40</sup> The second element is that such copying "went so far as to constitute improper appropriation."<sup>41</sup> The *Arnstein* court suggested two means by which evidence would sufficiently establish copying.<sup>42</sup> The first is an admission by the defendant.<sup>43</sup> The second is by circumstantial evidence establishing the defendant had access to the plaintiff's work, coupled with evidence of similarity between the works in question.<sup>44</sup> The court noted that without any similarity between the two works, no amount of access is sufficient to establish copying.<sup>45</sup> On the other hand, if there is no evidence of access, the plaintiff can still show copying if the

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33. *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946).

34. Alan Latman, "Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187, 1191 (1990).

35. *Arnstein v. Porter*, 154 F.2d at 464. Among Arnstein's allegations was that Porter had infringed on his composition "A Mother's Prayer" with "Begin the Beguine" and "My Heart Belongs to Daddy." *Id.* at 467. In 1939, Arnstein alleged that others had infringed on "A Mother's Prayer" through the publishing of "My Yiddisher Mama." *Song Writer*, *supra* note 2, at 18.

36. *Arnstein v. Porter*, 154 F.2d at 467.

37. *Id.* at 468.

38. *Id.* at 475.

39. *Id.* at 468.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

similarities between the works are "so striking as to preclude the possibility that [both parties] independently arrived at the same result."<sup>46</sup> If there is some evidence of access, "then the trier of the facts must determine whether the similarities are sufficient to prove copying."<sup>47</sup> Only if the plaintiff establishes copying does the second element of improper appropriation come into question.<sup>48</sup>

The modern test for copyright infringement incorporates the basic outline of the *Arnstein* test formulated by Judge Clark.<sup>49</sup> Commentators Melville Nimmer and David Nimmer suggest a two-part test that requires ownership of a proper copyright and proof of copying.<sup>50</sup> The second component of the Nimmer test, copying, encompasses the basic elements of the *Arnstein* test and requires proof of factual copying and actionable copying.<sup>51</sup> Factual copying establishes that "the defendant, in creating its work, used the plaintiff's material as a model, template, or even inspiration."<sup>52</sup> The plaintiff ordinarily establishes factual copying through proof of the defendant's access to the infringed work and substantial, or probative, similarity.<sup>53</sup> Factual copying alone, however, does not constitute infringement because "a defendant who has copied from a plaintiff's work as a factual matter . . . may not have copied as a legal matter."<sup>54</sup> Likewise, under the *Arnstein* test, proof of copying without proof of improper appropriation is insufficient to establish copyright infringement.<sup>55</sup> Nimmer suggests that the "legal question whether such copying as took place gives rise to liability for infringement" requires actionable copying.<sup>56</sup> Under Nimmer, actionable copying requires proof of substantial similarity.<sup>57</sup>

In the oversimplified phraseology of this Note, proof of factual copying, or simply copying under an *Arnstein* analysis, focuses primarily on *what* is similar.<sup>58</sup> As the Second Circuit Court of Appeals suggested, factual copying

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46. *Id.*

47. *Id.*

48. *Id.*

49. See MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.01, at 13-5 (1999).

50. *Id.* § 13.01, at 13-5 to -6.

51. *Id.* § 13.01[B], at 13-8.

52. *Id.*

53. *Id.* § 13.01[B], at 13-12. Legal scholar Alan Latman proposed substituting the word probative in place of substantial when discussing factual copying. *Id.*; see Latman, *supra* note 34, at 1204; see also discussion *infra* Part V.

54. NIMMER & NIMMER, *supra* note 49, § 13.01[B] at 13-8 n.26.2 (citing *Stillman v. Leo Burnett Co., Inc.*, 720 F. Supp. 1353, 1357 (N.D. Ill. 1989)).

55. See *Arnstein v. Porter*, 154 F.2d 464, 472 (2d Cir. 1946) ("Assuming that adequate proof is made of copying, that is not enough; for there can be 'permissible copying,' copying which is not illicit.").

56. NIMMER & NIMMER, *supra* note 49, § 13.01[B], at 13-9.

57. *Id.*

58. See *supra* notes 35-48 and accompanying text.

"requires only the fact that the infringing work copies something from the copyrighted work."<sup>59</sup> The improper appropriation component, however, is dependent on a determination of *how* similar the two works are to one another. The Second Circuit identified this requirement as a "quantitative component [that] generally concerns the amount of copyrighted work that is copied."<sup>60</sup> An allegation of infringement requires some means through which the court can assess, or explain, these two tenets of similarity between two works.

## II. THE SIMILARITY TESTS

### A. Expert Testimony

In Ira Arnstein's 1935 lawsuit against Emery Deutsch, the court heard testimony from music critic and author Sigmund Spaeth, whom the *New York Times* identified as the "tune detective."<sup>61</sup> More likely than not, Spaeth was called to testify as an expert who could explain to the court why Deutsch's composition was similar, or not similar, to Arnstein's song. Eleven years later, the *Arnstein* court defined the role of expert testimony in copyright infringement actions.<sup>62</sup> The *Arnstein* court stated that expert testimony was relevant only to the determination of whether two works were similar enough to establish copying, not to the question of improper appropriation.<sup>63</sup>

In *Repp v. Webber*,<sup>64</sup> the Second Circuit Court of Appeals reaffirmed the role of expert testimony in the determination of factual copying.<sup>65</sup> The *Repp* court's ruling, however, goes further than simply restating the role of expert testimony; the decision illuminates the critical role expert testimony may play in determining similarity. In *Repp*, the lower court had dispensed on summary judgment Repp's claim against Andrew Lloyd Webber for copyright infringement.<sup>66</sup> That court held Webber did not have access to Repp's composition; thus Repp could not establish actual copying and get past the first component of copyright infringement despite the alleged similarities between the two works.<sup>67</sup> The appeals court reversed the decision based on the testimony of two testifying

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59. Ringgold v. Black Entm't Television, 126 F.3d 70, 75 (2d Cir. 1997).

60. *Id.*

61. *Violinists*, *supra* note 2, at 26. In 1949, Arnstein named Spaeth as a defendant in a separate action. See *Loses Again*, *supra* note 2, at 15.

62. Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).

63. *Id.*

64. Repp v. Webber, 132 F.3d 882 (2d Cir. 1997).

65. *Id.* at 888-89.

66. *Id.* at 887. Repp alleged Webber's "Phantom Song" infringed on his song "Till You." *Id.* at 884.

67. *Id.* at 887.



experts who each found a "striking similarity" between the two compositions.<sup>68</sup> The higher court held that a finding of striking similarity overcame the missing proof of access.<sup>69</sup> Further, the court reasoned that a finding of striking similarity "certainly includes the element of probative similarity" and remanded the case for further proceedings.<sup>70</sup> The *Repp* court essentially ruled that expert testimony supporting a claim of striking similarity is sufficient to establish actual copying and satisfy the first component of an infringement action.<sup>71</sup>

In the recent case *ZZ Top v. Chrysler Corp.*,<sup>72</sup> expert testimony failed to establish the necessary similarity between two works in light of a judicial determination that "no reasonable person could confuse" the two works in question.<sup>73</sup> In *ZZ Top*, the musical group ZZ Top alleged Chrysler had copied the guitar riff from its song "La Grange" and used it as background music in a promotional video.<sup>74</sup> Chrysler conceded copying "La Grange" but challenged whether the guitar riff was original and copyrightable when ZZ Top recorded it as part of "La Grange."<sup>75</sup> Thus, the question before the court was not whether the music of Chrysler's promotional video was similar to "La Grange," but whether it was whether "La Grange" was similar to a prior creation by a third party—in this case, Norman Greenbaum's "Spirit in the Sky."<sup>76</sup>

To support its position, Chrysler offered the expert testimony of musicologist Robert Walser, who presented charts indicating the two songs shared an identical guitar riff.<sup>77</sup> The court dismissed Walser's testimony and method as representative of a subjective perception and not an objective one.<sup>78</sup> The court declined to follow the expert's finding of similarity, took judicial notice of Greenbaum's "Spirit in the Sky," and ruled as a matter of law that the two songs were not "substantially similar."<sup>79</sup> The court held the "La Grange" guitar riff copyrightable and granted partial summary judgment.<sup>80</sup>

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68. *Id.* at 890-91.

69. *Id.*

70. *Id.* at 891.

71. *See id.*

72. *ZZ Top v. Chrysler Corp.*, 54 F. Supp. 2d 983 (W.D. Wash. 1999).

73. *Id.* at 986.

74. *Id.* at 984-85.

75. *Id.* at 985. Chrysler identified John Lee Hooker's "Boogie Chillen" and Norman Greenbaum's "Spirit in the Sky" as examples of songs recorded prior to "La Grange" that were based on a substantially similar guitar riff. *Id.*

76. *Id.* at 985-86.

77. *Id.*

78. *Id.* at 986. Walser "changed the written music by reducing intervals, or power chords, to single notes." *Id.*

79. *Id.*

80. *Id.* at 985.

ZZ Top also challenged the admissibility of Walser's testimony because he was "not an expert in the blues-rock genre."<sup>81</sup> The court overruled the objection and held that such criticism only goes to the weight, not the admissibility, of the testimony.<sup>82</sup> The objection raises interesting questions regarding the qualifications of music experts given the diversity of musical genres. In *Moore v. Columbia Pictures Industries Inc.*,<sup>83</sup> the Eighth Circuit Court of Appeals held Moore had not established that "On Our Own," the theme song for the movie *Ghostbusters II*, was substantially similar to his song "She Can't Stand It."<sup>84</sup> The court emphasized that Moore's expert witness, who "had no understanding of what [hip-hop] meant," provided "inconclusive and unsubstantiated testimony" that could not overcome "the strength and depth" of defendant's expert testimony.<sup>85</sup> Apparently, Moore's expert could not recognize a hip-hop song and "was not aware that a particular sound, beat, or base [sic] line characterized hip-hop music."<sup>86</sup>

### B. Dissection

The *Arnstein* court also identified dissection analysis as a relevant means to assess similarity in the determination of whether copying has occurred.<sup>87</sup> The dissection test is, as the name suggests, the breaking apart of a copyrighted work into its component parts, often as a means to distinguish those portions that qualify for copyright protection from those that do not.<sup>88</sup> In *CMM Cable Rep, Inc. v. Ocean Coast Properties, Inc.*,<sup>89</sup> the First Circuit Court of Appeals suggested that dissection of the works in question is a necessary part of any infringement analysis.<sup>90</sup> The court noted that even if "similarity exists between [the works] when taken as a whole," there is no *prima facie* case unless there is similarity between those portions of the whole subject to copyright protection.<sup>91</sup> The court continued, "[b]y dissecting the accused work and identifying those features which are protected in the copyrighted work, the court may be able to determine as a matter of law whether or not the former has copied protected aspects of the

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81. *Id.*

82. *Id.*

83. *Moore v. Columbia Pictures Indus., Inc.*, 972 F.2d 939 (8th Cir. 1992).

84. *Id.* at 946.

85. *Id.*

86. *Id.*

87. *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

88. *See CMM Cable Rep, Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504, 1515 (1st Cir. 1996).

89. *CMM Cable Rep, Inc. v. Ocean Coast Props., Inc.*, 97 F.3d 1504 (1st Cir. 1996).

90. *Id.* at 1514-15.

91. *Id.* (quoting MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §13.03[B][2], at 13-67 (1995) (brackets in original)).

latter.”<sup>92</sup> Thus, dissection is essentially a test to determine what is similar rather than the extent of similarity. The *CMM* court suggested employing the “ordinary observer” test as a measure of substantial similarity.<sup>93</sup>

The Ninth Circuit Court of Appeals, likewise, identified limits on the applicability of dissection analysis in *Dr. Seuss Enterprises v. Penguin Books USA, Inc.*<sup>94</sup> In *Dr. Seuss*, the court applied an extrinsic and intrinsic analysis<sup>95</sup> to determine the similarity between Dr. Seuss’ children’s book *The Cat in the Hat* and Penguin’s publication of a Seussian retelling of the O.J. Simpson trial entitled *The Cat NOT in the Hat*.<sup>96</sup> Penguin’s defense included an analytic dissection of the similarities between the works such as the title, the design of the cover lettering, and the use of a “whimsical poetic style” written in anapestic tetrameter.<sup>97</sup> Each of the noted similarities, Penguin argued, corresponded to a feature of the plaintiff’s work that was not subject to copyright protection.<sup>98</sup> The court, however, found the argument misapplied and restricted analytic dissection to the extrinsic, objective portion of the test and excluded it from the subjective, intrinsic portion, which considers the work as a whole and asks if there is a similarity of expressions.<sup>99</sup> Again, dissection analysis was limited to a determination of what was similar, rather than whether that similarity was substantial enough to constitute infringement.<sup>100</sup>

### C. Abstractions Test

In 1930, Judge Learned Hand, writing for the majority in *Nichols v. Universal Pictures Corp.*,<sup>101</sup> put forward the abstractions test of similarity.<sup>102</sup> In that case, Nichols, a playwright, alleged Universal Pictures had infringed on her play *Abie’s Wild Rose* with the motion picture *The Cohens and the Kellys*.<sup>103</sup> Judge Hand wrote:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident

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92. *Id.* at 1515 (quoting *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 608-09 (1st Cir. 1988)).

93. *Id.* (citing *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d at 608-09).

94. *Dr. Seuss Enters. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1399 (9th Cir. 1997).

95. *Id.* at 1398; see *infra* Part III.D (discussing the extrinsic/intrinsic test).

96. *Dr. Seuss Enters. v. Penguin Books USA, Inc.*, 109 F.3d at 1398.

97. *Id.* at 1399.

98. *Id.*

99. See *id.* at 1398.

100. See *id.*

101. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

102. *Id.* at 121.

103. *Id.* at 120.

is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended.<sup>104</sup>

Hand suggested a test that is not so much a means to divine similarity but rather a means to segregate the idea from the expression. In *Nichols*, Hand concluded that "[t]hough the plaintiff discovered the vein, she could not keep it to herself; so defined, the theme was too generalized an abstraction from what she wrote. It was only a part of her 'ideas.'"<sup>105</sup> Hand's analysis, in essence, is useful in ascertaining what is similar—the abstract idea or the expression of the idea—rather than how similar two works are to one another.

The Second Circuit Court of Appeals applied an abstraction analysis and demonstrated the judicial process for determining what is similar in *Mattel, Inc. v. Azrak-Hamway International, Inc.*<sup>106</sup> In *Mattel*, the appellate court affirmed a lower court ruling that the makers of "Warlords" action figure toys had not infringed on Mattel's copyright for its "Masters of the Universe" action figures.<sup>107</sup> Both dolls depicted crouching human figures with "overdeveloped musculature and legs proportionately shorter than the average human being's."<sup>108</sup> The court found that the only similarity between the two dolls was the shared "unprotectable idea [of] a superhuman muscleman crouching in what since Neanderthal times has been a traditional fighting pose."<sup>109</sup> A crouching figure is not unique, nor does it qualify for copyright protection.<sup>110</sup> The expression of the crouching figure, however, was subject to copyright protection, and, in that respect, the court found the two dolls were dissimilar because each sculptor chose to emphasize different muscle groups.<sup>111</sup>

The Second Circuit Court of Appeals again relied upon Hand's abstraction analysis in *Williams v. Chrichton*.<sup>112</sup> Geoffrey Williams alleged infringement on his four copyrighted books each taking place in "Dinosaur World" by Michael Chrichton's novel *Jurassic Park* and the movie of the same name.<sup>113</sup> The court

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104. *Id.* at 121 (citations omitted).

105. *Id.* at 122.

106. *Mattel, Inc. v. Azrak-Hamway Int'l, Inc.*, 724 F.2d 357, 360 (2d Cir. 1983).

107. *Id.* at 359-60.

108. *Id.* at 360.

109. *Id.*

110. *See id.*

111. *Id.* The court noted that a lay observer would recognize the differences in the musculature of the two dolls. *Id.*

112. *Williams v. Chrichton*, 84 F.3d 581, 588 (2d Cir. 1996).

113. *Id.* at 582.

examined similarities of "theme, setting, characters, time sequence, plot, and pace"<sup>114</sup> and affirmed the lower court decision to grant summary judgment in favor of Chrichton.<sup>115</sup> The court determined that "[a]ny similarity in the theme of the parties' works relates to the unprotectable idea of a dinosaur zoo. Once one goes beyond this level of abstraction, the similarity in themes disappears."<sup>116</sup>

*D. Extrinsic/Intrinsic Analysis and the Total Concept and Feel*

In 1977, the Ninth Circuit Court of Appeals affirmed a jury determination that McDonaldland, McDonald's Corporation's commercial fantasy world governed by Mayor McCheese, was substantially similar in "total concept and feel" to Sid and Marty Krofft's Saturday morning children's television show *H.R. Pufnstuf*.<sup>117</sup> In its discussion of the infringement question, the appeals court noted that the "real task in a copyright infringement action . . . is to determine whether there has been copying of the expression of an idea rather than just the idea itself."<sup>118</sup> The court identified Judge Hand's abstractions test as the best means "to distill the unprotected idea from the protected expression."<sup>119</sup> Once separated, the court stated "there also must be substantial similarity not only of the general ideas but of the expressions of those ideas as well."<sup>120</sup> The court interpreted substantial similarity to mean a two-step analytical process involving an extrinsic test and an intrinsic test.<sup>121</sup> This extrinsic/intrinsic framework, the court suggested, was an "explicit" restatement of the basic idea-expression dichotomy alluded to in *Arnstein*.<sup>122</sup>

The extrinsic test examines how similar the ideas behind two works are to one another.<sup>123</sup> The extrinsic analysis may rely upon specific criteria such as "the materials used, the subject matter, and the setting for the subject."<sup>124</sup> Extrinsic analysis may also incorporate other tests such as "analytic dissection and expert testimony."<sup>125</sup> The court suggested a linear application of the two tests: "If there

114. *Id.* at 589.

115. *Id.* at 591.

116. *Id.* at 589.

117. *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1167 (9th Cir. 1977).

118. *Id.* at 1163.

119. *Id.*

120. *Id.* at 1164.

121. *Id.*

122. *Id.* at 1165; see *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946). The *Krofft* court distinguished the extrinsic/intrinsic test from its predecessor noting that the court does "not resurrect the *Arnstein* approach." *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d at 1165 n.7.

123. *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d at 1164.

124. *Id.*

125. *Id.*



is substantial similarity in ideas, then the trier of fact must decide whether there is substantial similarity in the expressions of the ideas so as to constitute infringement."<sup>126</sup>

The intrinsic test relies "on the response of the ordinary reasonable person."<sup>127</sup> Again, expert testimony and analytic dissection are limited in application and are inappropriate when analyzing whether copying constitutes actual infringement.<sup>128</sup> In *Krofft*, the court found that McDonald's relied upon a misapplied dissection analysis directed at the intrinsic test.<sup>129</sup> McDonald's and co-defendants Needham, Harper & Steers<sup>130</sup> did "not dispute the fact they copied the idea of [Sid & Marty Krofft's] Pufnstuf television series" but instead argued that the expressions of the idea were too dissimilar to constitute infringement.<sup>131</sup> The court concluded that McDonald's had essentially conceded the extrinsic test, and the issue before the court centered on the intrinsic analysis.<sup>132</sup> McDonald's, however, focused attention on alleged, specific dissimilarities of expression such as the costuming of H.R. Pufnstuf's mayoral outfit, which featured a blue cummerbund, and Mayor McCheese's "'pink formal dress' tails 'with knicker trousers . . . [and] a typical diplomat's sash.'"<sup>133</sup> In light of an intrinsic analysis, the court found the argument unconvincing, noting it did "not believe that the ordinary reasonable person, let alone a child, viewing these works will ever notice that Pufnstuf is wearing a cummerbund while Mayor McCheese is wearing a diplomat's sash."<sup>134</sup>

After viewing samples of both works, the *Krofft* court found it "clear" that McDonaldland and its inhabitants were substantially similar to the "Living Island" of *H.R. Pufnstuf*, thus having captured the "total concept and feel" of Sid & Marty Krofft's creation.<sup>135</sup> The court drew the phrase total concept and feel from a Ninth Circuit decision resolving a dispute between two greeting card manufacturers.<sup>136</sup> In *Roth Greeting Cards v. United Card Co.*,<sup>137</sup> the court found "that in total concept and feel the cards of United are the same as the copyrighted

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 1166-67.

130. Needham, Harper & Steers was the advertising agency behind the McDonaldland campaign. *Id.* at 1161.

131. *Id.* at 1166.

132. *Id.*

133. *Id.* (quoting defendants description of the characters).

134. *Id.* at 1167.

135. *Id.* (citing *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970)); see also *id.* at 1167 n.9 (describing the characters and characteristics of McDonaldland and *H.R. Pufnstuf*'s Living Island).

136. *Id.* at 1167; *Roth Greeting Cards v. United Card Co.*, 429 F.2d at 1107.

137. *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970).

cards of Roth."<sup>138</sup> The court reasoned that "the text, arrangement of text, art work, and association between art work and text"<sup>139</sup> considered as a whole "represent[ed] a tangible expression of an idea."<sup>140</sup> The *Roth* court appears to suggest that courts may consider the components of two works so long as they are thematic in nature and representative of general perceptions or concepts.<sup>141</sup> Recall, however, that the *Krofft* court stated that an examination of specific elements of similarity or dissimilarity is not permissible when such elements constitute a dissection of the constituent parts of the works.<sup>142</sup> Thus, there must be a demarcation between sub-parts that are concepts of the whole and those that are merely constituent parts of the whole. Nimmer, on the other hand, suggests that the underlying reasoning of "'total concept and feel' threatens to subvert the very essence of copyright" in that "[c]oncepts are statutorily ineligible for copyright protection."<sup>143</sup> Further, Nimmer contends the phrase is of limited value as an inquiry into similarity "and would better be abandoned."<sup>144</sup>

In *Chase-Riboud v. Dreamworks, Inc.*,<sup>145</sup> a federal district court upheld a modification of the extrinsic/intrinsic similarity test.<sup>146</sup> The court suggested a movement away from the idea-expression dichotomy and towards "objective and subjective analyses."<sup>147</sup> The issue before the court was whether Dreamworks had infringed on Chase-Riboud's literary work *Echo of Lions* with the release of its film *Amistad*.<sup>148</sup> The court noted that extrinsic analysis should examine the similarity of both ideas and expressions, while the intrinsic test is a subjective evaluation of expression.<sup>149</sup> Further, analytic dissection is appropriate to discriminate between protected and unprotected portions of the whole.<sup>150</sup> Thus, the extrinsic test becomes an objective analysis of what is similar—ideas

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138. *Id.* at 1110. Nimmer describes the *Roth* decision as "generally unremarkable except for its having coined the phrase 'total concept and feel.'" NIMMER & NIMMER, *supra* note 49, § 13.03[A][1][c], at 13-36.

139. *Roth Greeting Cards v. United Card Co.*, 429 F.2d at 1109.

140. *Id.* at 1110.

141. *See id.*

142. *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1165 (9th Cir. 1977).

143. NIMMER & NIMMER, *supra* note 49, § 13.03[A][1][c], at 13-39 (citation omitted).

144. *Id.* at 13-40. Nimmer emphasizes that "total concept and feel" is especially inappropriate for infringement disputes involving computer software and that it should be limited to "simplistic works that require only a highly 'intrinsic' (i.e. unanalytic) evaluation." *Id.* at 13-38 to -39 (citation omitted).

145. *Chase-Riboud v. Dreamworks, Inc.*, 987 F. Supp. 1222 (C.D. Cal. 1997).

146. *Id.* at 1225-26.

147. *Id.* (quoting *Shaw v. Lindheim*, 919 F.2d 1353, 1357 (9th Cir. 1990)).

148. *Id.* at 1224.

149. *Id.* at 1226 (citing *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442-43 (9th Cir. 1994)).

150. *Id.* (citing *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d at 1442-43).

and/or expressions—and the intrinsic test is a subjective test of how similar the two works are to one another.<sup>151</sup>

In *Williams v. Crichton*,<sup>152</sup> the Second Circuit Court of Appeals found the total concept and feel test to be especially appropriate because the action involved “children’s works” which “are often less complex than those aimed at an adult audience.”<sup>153</sup> The court found the total concept and feel of Williams’ Dinosaur World children’s books substantially different from Crichton’s novel *Jurassic Park*.<sup>154</sup> The court noted that *Jurassic Park* featured villainous characters, gruesome bloodshed, and “a world out of control,” while the Dinosaur World books told adventure stories about a world well under control with “happy endings.”<sup>155</sup> The court did not place the total concept and feel analysis within the framework of an extrinsic/intrinsic analysis.<sup>156</sup>

### E. Ordinary Observer

In *Dawson v. Hinshaw Music Inc.*,<sup>157</sup> the Fourth Circuit Court of Appeals cited *Arnstein v. Porter* as “the source of modern theory regarding the ordinary observer test.”<sup>158</sup> In *Arnstein*, the court noted that copyright law is necessary to protect the copyright holder’s financial interests.<sup>159</sup> Because that financial return comes from the public, the *Arnstein* court identified the critical issue as “whether defendant took from plaintiff’s works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed.”<sup>160</sup> In *Dawson*, the court reversed a lower court finding that relied upon an interpretation of the ordinary observer test wherein a lay listener was synonymous with a lay observer.<sup>161</sup> The appellate court reasoned that the “principles of copyright law” required “orientation of the ordinary observer test to the works’ intended audience.”<sup>162</sup> Only when “the lay public fairly represents

151. *Id.* (citing *Shaw v. Linheim*, 919 F.2d at 1357).

152. *Williams v. Crichton*, 84 F.3d 581 (2d Cir. 1996).

153. *Id.* at 589. *But see* *Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc.* 150 F.3d 132, 140 (2d Cir. 1998) (finding the total concept and feel analysis inappropriate when the two works are of different media).

154. *Williams v. Crichton*, 84 F.3d at 589.

155. *Id.*

156. *Id.*

157. *Dawson v. Hinshaw Music Inc.*, 905 F.2d 731 (4th Cir. 1990).

158. *Id.* at 733.

159. *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946) (“The plaintiff’s legally protected interest is not, as such, his reputation as a musician but his interest in the potential financial returns from his compositions which derive from the lay public’s approbation of his efforts.”).

160. *Id.*

161. *Dawson v. Hinshaw Music Inc.*, 905 F.2d at 733.

162. *Id.*

the works' intended audience" may the court characterize an ordinary lay observer as the ordinary person of the ordinary person test.<sup>163</sup>

Noting that interpretations of *Arnstein* were too broad, the *Dawson* court refined the ordinary observer test and limited the perspective of the ordinary observer to members of the intended audience.<sup>164</sup> The court held:

[When the] lay public fairly represents the intended audience, the court should apply the lay observer formulation of the ordinary observer test. However, if the intended audience is more narrow in that it possesses specialized expertise . . . that lay people would lack, the court's inquiry should focus on whether a member of the intended audience would find the two works to be substantially similar.<sup>165</sup>

At issue in *Dawson* was the arrangement of a traditional spiritual song.<sup>166</sup> The *Dawson* court remanded the case for clarification of the intended audience, noting that, while the public is typically the intended audience for popular songs, musical arrangers may intend their creations for choral directors and others "who possess specialized expertise."<sup>167</sup>

In the Ninth Circuit, the intrinsic portion of the extrinsic/intrinsic test asks whether "an 'ordinary reasonable person' would perceive a substantial taking of protected expression."<sup>168</sup> In *Roth*, the court noted that the "test of infringement is whether the work is recognizable by an ordinary observer as having been taken from the copyrighted source."<sup>169</sup> The Sixth Circuit Court of Appeals identified the ordinary observer test as "the traditional standard of copyright infringement"<sup>170</sup> but declined to adopt the extrinsic/intrinsic framework.<sup>171</sup> In *Ellis v. Diffie*,<sup>172</sup> the court adhered to Nimmer's interpretation of the ordinary observer test, requiring "the trier of fact to gauge the similarities of the two works [based] solely on . . . 'net impression' and without relying on expert analysis or dissection."<sup>173</sup>

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163. *Id.*

164. *Id.* at 734.

165. *Id.* at 736.

166. *Id.* at 732.

167. *Id.* at 737.

168. *Chase-Riboud v. Dreamworks, Inc.*, 987 F. Supp. 1222, 1226 (C.D. Cal. 1997).

169. *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1978) (quoting *Bradbury v. Columbia Broad. Sys., Inc.*, 287 F.2d 478, 485 (9th Cir. 1961)).

170. *Ellis v. Diffie*, 177 F.3d 503, 506 (6th Cir. 1999).

171. *Id.* at 506 n.2.

172. *Ellis v. Diffie*, 177 F.3d 503 (6th Cir. 1999).

173. *Id.* at 506 n.2 (citing MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 13.02[B] (revised 1998)). The court's decision in *Ellis* centered upon the access element of copyright infringement; thus, the substantial similarity of the two songs was not assessed. *Id.* at 506.

F. *Qualitative/Quantitative*

In the Second Circuit, a different framework for analyzing similarity has emerged based on qualitative and quantitative analyses.<sup>174</sup> In *Ringgold v. Black Entertainment Television, Inc.*,<sup>175</sup> the issue was whether using a copyrighted poster as part of the set decoration for a television program constituted infringement when the network broadcast the program.<sup>176</sup> The court followed the standard test that infringement requires both factual copying (probative similarity) and actionable copying (substantial similarity).<sup>177</sup> The factual copying component was easily satisfied because the actual poster appeared in the broadcast.<sup>178</sup> The actionable copying component required copying to be "quantitatively and qualitatively sufficient to support the legal conclusion that infringement (actionable copying) has occurred."<sup>179</sup> The court identified the qualitative component as requiring a "copying of expression, rather than ideas" and noted that such "a distinction . . . often turns on the level of abstraction at which the works are compared."<sup>180</sup> The qualitative component examines what is similar and whether it is a copyrightable expression.<sup>181</sup> The quantitative component of the test "generally concerns the amount of the copyrighted work that is copied."<sup>182</sup> In *Ringgold*, the court examined the quantity of similarity based on the "observability of the copied work," considering the length of time the poster was visible during the program "and such factors as focus, lighting, camera angles, and prominence."<sup>183</sup> Quantitative analysis also raises the issue of whether the amount copied surpasses the de minimis threshold.<sup>184</sup>

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174. See *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 75 (2d Cir. 1997) (stating substantial similarity "requires that the copying is quantitatively and qualitatively sufficient to support the legal conclusion that infringement (actionable copying) has occurred").

175. *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70 (2d Cir. 1997).

176. *Id.* at 72-73.

177. *Id.* at 74-75.

178. *Id.* at 75 ("[T]here is no dispute about copying as a factual matter: the 'Church Picnic' poster itself, not some poster that was similar in some respects to it, was displayed on the set of defendants' television program.").

179. *Id.*

180. *Id.*

181. See *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 138-39 (2d Cir. 1998) (holding trivia questions drawn from episodes of the television series *Seinfeld* were not "unprotected facts, but, rather, creative expression").

182. *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d at 75.

183. *Id.*

184. *Id.*; see also *infra* Part IV (discussing the de minimis threshold and scenes a faire).



## IV. WHEN A LITTLE IS NOT ENOUGH

A. *De Minimis*

*Black's Law Dictionary* translates the legal maxim "de minimis non curat lex" as "[t]he law does not concern itself about trifles."<sup>185</sup> The *Ringgold* court noted that the de minimis concept "insulates from liability those who cause insignificant violations of the rights of others."<sup>186</sup> The court identified three aspects by which the de minimis concept may be applicable in a copyright action.<sup>187</sup> The second of these is that "de minimis can mean that copying has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity."<sup>188</sup> In other words, the de minimis threshold relies on a measurement of how similar two works are to each other or the extent of copying.

In *Ringgold*, the court measured the amount of time the poster in question was visible during the offending broadcast—26.75 seconds over the course of nine segments—and held that it crossed the de minimis threshold required for substantial similarity to prove actionable copying.<sup>189</sup> In *Sandoval v. New Line Cinema Corp.*,<sup>190</sup> the Second Circuit found that the use of Sandoval's photographs as part of the set decoration for a scene from the movie *Seven* fell "below the quantitative threshold of substantial similarity."<sup>191</sup> The court considered the quality of the use as well as quantity and noted that the "photographs appear fleetingly and are obscured, severely out of focus, and virtually unidentifiable."<sup>192</sup> In *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*,<sup>193</sup> the Second Circuit chose to measure the amount of expression copied from eighty-four episodes of *Seinfeld* in the aggregate, rather than the amount copied from each individual episode.<sup>194</sup>

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185. BLACK'S LAW DICTIONARY 431 (6th ed. 1990).

186. *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d at 74.

187. *Id.* at 74-75. The first is a technical violation of copyright law "so trivial that the law will not impose legal consequences," such as taking a cartoon from a *New Yorker* magazine and posting it on a refrigerator. *Id.* at 74. The third pertains to the fair use doctrine. *Id.* at 75.

188. *Id.* at 74.

189. *Id.* at 76.

190. *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215 (2d Cir. 1998).

191. *Id.* at 218.

192. *Id.*

193. *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132 (2d Cir. 1998).

194. *Id.* at 138.

B. *Scenes a Faire*

Somewhat akin to the idea-expression dichotomy, separating the copy-rightable expression from the uncopyrightable idea, is the doctrine of scenes a faire. Copyright protection does not extend to common settings, sequences of events and "stock themes . . . that often arise in works of a particular genre."<sup>195</sup> Courts define such "incidents, characters or setting which are as a practical matter indispensable, or at least standard, in the treatment of a given topic" as scenes a faire.<sup>196</sup>

In *Whitehead v. Paramount Pictures Corp.*,<sup>197</sup> plaintiff David Whitehead alleged Paramount Pictures had copied elements of his book *Brains, Sex, & Racism in the C.I.A. and the Escape* for the films *Bad Company* and *Mission: Impossible*.<sup>198</sup> Regarding *Bad Company*, Whitehead alleged "several hundred points" of similarity between the works.<sup>199</sup> The court, however, granted summary judgment for Paramount Pictures, holding "that the alleged similarities do not concern any protectible element of Mr. Whitehead's book and that no reasonable trier of fact could find the works substantially similar."<sup>200</sup> Among those similarities not protected by copyright were scenes a faire.<sup>201</sup> *Bad Company* and Whitehead's book shared similar characters such as a "slightly paranoid" CIA agent and a blond woman in a red dress.<sup>202</sup> The court noted the commonality of having "CIA agents and other covert operatives" appear slightly paranoid in films and that such a condition "is a non-copyrightable scene a faire."<sup>203</sup> The court further noted that "[b]lond women in red dresses are ubiquitous images in movies of every genre."<sup>204</sup> The court additionally assessed the plot and setting and denied Whitehead's allegation that an escape scene in

195. *Whitehead v. Paramount Pictures Corp.*, No. Civ.A. 96-2436 (PLF), 1999 WL 450794, at \*8 (D.D.C. June 30, 1999).

196. *Chase-Riboud v. Dreamworks, Inc.*, 987 F. Supp. 1222, 1227 (C.D. Cal. 1997) (citing *Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978)).

197. *Whitehead v. Paramount Pictures Corp.*, No. Civ.A. 96-2436 (PLF), 1999 WL 450794 (D.D.C. June 30, 1999).

198. *Id.* at \*1. Whitehead filed a total of nine actions claiming infringement on *Brains, Sex, & Racism in the C.I.A. and the Escape* by the release of movies including *Titanic*, *The Net*, and *Eraser* and publication of the book *How Stella Got Her Groove Back*. *Id.* at \*16. His multiple allegations and filings are reminiscent of those by Ira Arnstein, and like Arnstein, Whitehead appeared pro se. *Id.* at \*17; see *supra* Part I (discussing Ira Arnstein's penchant for filing copyright infringement actions and arguing pro se).

199. *Whitehead v. Paramount Pictures Corp.*, 1999 WL 450794, at \*9.

200. *Id.* at \*8.

201. *Id.*

202. *Id.* at \*9-\*10.

203. *Id.* at \*9.

204. *Id.* at \*10.

*Mission: Impossible* constituted infringement.<sup>205</sup> The court noted that "[e]scape scenes are common in action movies, and Mr. Whitehead does not hold exclusive rights to the existence of an escape scene in a book or movie."<sup>206</sup>

A unique expression of the genre, however, is copyrightable.<sup>207</sup> In *Metro-Goldwyn-Mayor, Inc. v. American Honda Motor Co., Inc.*,<sup>208</sup> plaintiff alleged Honda infringed on copyrights to sixteen James Bond films through a television commercial for an automobile.<sup>209</sup> The commercial featured a well-dressed couple and an escape from a "villain with metal-encased arms" who jumps out of a helicopter.<sup>210</sup> The court held that "James Bond films are unique in their expression of the spy thriller idea" and bring the various elements of a helicopter chase "together in a unique and original way."<sup>211</sup> A critical factor was that the court considered James Bond films as a source of the "action/spy film" genre, rather than just an imitator.<sup>212</sup>

The court in *Black v. Gosdin*<sup>213</sup> applied the scenes a faire doctrine to music.<sup>214</sup> Black alleged Gosdin infringed on the copyright to the lyrics of his country song "The Jukebox" with the song "Set 'Em Up Joe."<sup>215</sup> Black argued that Gosdin had "unlawfully appropriated the 'particular subjective quality'" of the lyrics by incorporating such elements as a bar and a jilted lover.<sup>216</sup> The court noted that "the subject matter of the two songs is so common in country music that it constitutes one of the genre's 'stock' themes."<sup>217</sup> The court granted summary judgment for Gosdin, noting that "[e]lements which are more or less basic to a given setting or situation are known as 'scenes a faire,' and are beyond the scope of copyright protection."<sup>218</sup>

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205. *Id.* at \*13.

206. *Id.*

207. *See Metro-Goldwyn-Mayor, Inc. v. Am. Honda Motor Co., Inc.*, 900 F. Supp. 1287, 1290-95 (C.D. Cal. 1995) (granting a preliminary injunction against the use of a commercial infringing on the action sequences in James Bond films).

208. *Metro-Goldwyn-Mayor, Inc. v. Am. Honda Motor Co., Inc.*, 900 F. Supp. 1287 (C.D. Cal. 1995).

209. *Id.* at 1291.

210. *Id.*

211. *Id.* at 1295.

212. *Id.* at 1294.

213. *Black v. Gosdin*, 740 F. Supp. 1288 (M.D. Tenn. 1990).

214. *Id.* at 1292.

215. *Id.* at 1289.

216. *Id.* at 1292.

217. *Id.*

218. *Id.* at 1293-94.

## V. THE SCHOLARS WILL HAVE THEIR SAY

Over the past decade, a number of legal scholars have attempted to bring clarity to the confusing array of similarity tests employed by the courts. Perhaps the most influential was Alan Latman's 1990 proposal that proof of similarity to establish factual copying need only be probative rather than substantial.<sup>219</sup> Latman sought to dispel the myth that substantial similarity was required to satisfy the first component of the *Arnstein* test—factual copying.<sup>220</sup> All that is required for the first component, Latman proposed, is probative proof of similarity, but continued use of the term "substantial similarity" perpetuates the myth.<sup>221</sup> Latman suggested the term "probative similarity" and argued that the phrase would help avoid "the confusion inherent in double usage of the term 'substantial similarity'" and remind courts that there "may be other facts probative of copying."<sup>222</sup>

Others have proposed that courts adopt a comprehensive test for either copyright infringement or assessing substantial similarity. Michael Sharb suggested a redefined total concept and feel test that would allow for protection of the artist's particular style.<sup>223</sup> The key element of Sharb's five-part infringement test asks if "the alleged infringing work captures the total concept and feel of the copyrighted work."<sup>224</sup> The five-part test, however, relies upon other tests to determine the line between idea and expression, and the ordinary observer test to assess whether similarity is substantial.<sup>225</sup>

Two years after Sharb's proposal, Edward Wilde proposed doing away with the idea-expression dichotomy completely and replacing it with a market-based analysis.<sup>226</sup> Wilde contended that "[n]othing in the idea/expression dichotomy offers guidance as to what is protectible beyond that provided by

219. Latman, *supra* note 34, at 1187. Courts have responded approvingly to Latman's proposal. See, e.g., *Ringgold v. Black Entm't Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997) (distinguishing factual copying (probative similarity) from actionable copying (substantial similarity)); *Szabo v. Errisson*, 68 F.3d 940, 944 (5th Cir. 1995) (same). But see *Ellis v. Diffie*, 177 F.3d 503, 507 (6th Cir. 1999) (requiring proof of access and substantial similarity to establish copying).

220. Latman, *supra* note 34, at 1188.

221. *Id.* at 1214.

222. *Id.* at 1204.

223. Michael L. Sharb, *Getting a "Total Concept and Feel" of Copyright Infringement*, 64 U. COLO. L. REV. 903, 924 (1993).

224. *Id.* at 922. The five part test requires (1) a valid copyright; (2) copying; (3) copying of a protected expression not an idea; (4) substantial similarity; and, (5) taken from the perspective of an ordinary observer of the intended audience. *Id.* at 920-22.

225. *Id.* at 920-22.

226. Edward C. Wilde, *Replacing the Idea/Expression Metaphor with a Market-Based Analysis in Copyright Infringement Actions*, 16 WHITTIER L. REV. 793, 793-94 (1995).

copyright law in general," nor does it provide assistance in determining substantial similarity.<sup>227</sup> Wilde specifically targeted the abstraction test as inadequate because it does "not tell the court what to abstract and how many 'series' to go through."<sup>228</sup> Rather than distinguishing idea from expression, Wilde proposed that courts "determine whether the copied similarities in the second work are such that the second work can substitute for the first work or otherwise usurp the proper market position of the first work."<sup>229</sup> Under Wilde's proposed test, the courts must "take the time to understand the current market conditions for the products in question" through expert testimony.<sup>230</sup> The alleged advantage of the market-based approach is that it limits findings of copyright infringement only to those situations where financial gains are at risk to the copyright holder.<sup>231</sup>

Aaron Broaddus suggested a comprehensive test based upon the "filtration" approach commonly used in computer software cases.<sup>232</sup> Filtration involves identifying the protectible elements of the works and then employing the "traditional lay observer" test to determine if the similarities constitute infringement.<sup>233</sup> Jeanette Rene Busek offered that, rather than trying to fit all cases within a comprehensive test, the courts "would be better off recognizing the vast differences between the types of works covered by copyright law and articulating their decisions based on the amount of expressive variation available to a particular type of work."<sup>234</sup>

## VI. CONCLUSION

Nimmer notes that "the determination of the extent of similarity that will constitute a *substantial*, and hence infringing, similarity presents one of the most difficult questions in copyright law, and one that is the least susceptible of helpful generalizations."<sup>235</sup> Add in the issues of probative similarity, the need to distinguish factual copying from actionable copying, and the process of finding the legal fact of familiarity between two creative works, and it becomes even less

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227. *Id.* at 824 (citing Richard Jones, *The Myth of the Idea/Expression Dichotomy in Copyright Law*, 10 PACE L. REV. 551, 588 (1990)).

228. *Id.* at 833.

229. *Id.* at 841.

230. *Id.* at 837.

231. *Id.* Wilde argued, "a mere finding of several objective similarities does not mean that one work will substitute for the other in the market place." *Id.*

232. Aaron M. Broaddus, *Eliminating the Confusion: A Restatement of the Test for Copyright Infringement*, 5 DEPAUL-LCA J. ART & ENT. L. & POL'Y 43, 43 (1995).

233. *Id.* at 74.

234. Jeannette Rene Busek, *Copyright Infringement: A Proposal for a New Standard for Substantial Similarity Based on the Degree of Possible Expressive Variation*, 45 UCLA L. REV. 1777, 1803 (1998).

235. NIMMER & NIMMER, *supra* note 49, §13.03[A], at 13-27.



susceptible to a "helpful" generalization. Proving similarity and infringement also becomes less susceptible to a one-size-fits-all comprehensive test. This seems especially true given the variety of expressions that are subject to copyright protection and the need to accommodate the differences between the media.

Perhaps the tests laid out above are not a means to determine similarity, but rather a means to explain a finding of similarity that is determined in such a way that defies clear explanation. The words expressed by Justice Stewart regarding the strained definitions of obscenity provide a fitting analogy: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . ."<sup>236</sup> The confusing array of tests is not merely a means to prove similarity; it provides a lexicon to explain what is similar, the extent of similarity, and whether that similarity constitutes copyright infringement. Perhaps Ira B. Arnstein's approach to proving infringement illuminates the one true similarity test: he sat down at a piano in the courtroom and asked the court to recognize the similarity between two songs—if they heard it.<sup>237</sup>

*B. MacPaul Stanfield*

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236. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

237. *Song Writer*, *supra* note 2, at 18.