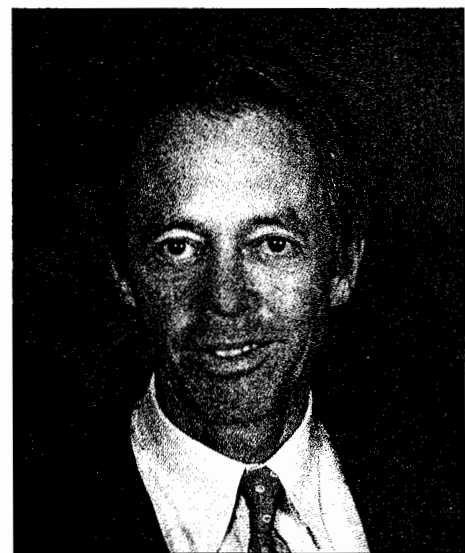


The Evolution and Inevitable Demise of the Extrinsic-Intrinsic Test for Determining “Substantial Similarity” in Copyright Cases



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THE MOST CONTENTIOUS, and frequently most difficult, issue in most copyright infringement cases is the determination of whether the two works at issue are “substantially similar.” In the Ninth Circuit, the determination of “substantial similarity” for most works is made using the now familiar “extrinsic-intrinsic” test.¹ In its original form, the extrinsic-intrinsic test consisted of two completely independent tests: the extrinsic test was a measure of whether there was substantial similarity in the general ideas of both works and the intrinsic test measured whether there was substantial similarity in the protectable expression of both works. Although courts in the Ninth Circuit continue to pay lip service to the extrinsic-intrinsic test, the application of the test has undergone a wholesale transformation so that today

it bears little or no resemblance to its original formulation. Indeed, the extrinsic-intrinsic test has so far departed from its original intent that the former two-part extrinsic-intrinsic test has been reduced to a single critical extrinsic test, making the intrinsic component of the test practically irrelevant. It is therefore time to begin asking whether the traditional extrinsic-intrinsic test should be abandoned entirely and replaced with something that more accurately describes what courts are actually doing in practice.

THE EXTRINSIC-INTRINSIC TEST WAS INTRODUCED IN *SID & MARTY KROFFT V. MCDONALD'S CORP.*

The Ninth Circuit adopted its extrinsic-intrinsic test in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*² *Krofft* involved a copyright infringement claim in which the plaintiffs alleged that defendants’ “McDonaldland” television commercials featuring Mayor McCheese and various other keystone cop characters living in an imaginary world of anthropomorphic plants and animals infringed plaintiffs’ “H.R. Pufnstuf” children’s television show which featured similar characters living in a similar fantasy world. After a jury trial in which plaintiffs prevailed, the defendants appealed to the Ninth Circuit.

The Ninth Circuit began its analysis by reciting the elements of copyright infringement: ownership of a valid copyright and copying by the defendant.³ It

then noted that the element of “copying” was usually established by proof of access to the copyrighted work and substantial similarity.⁴ After listing the elements of copyright infringement, the court complained that these elements overstated the scope of copyright protection and expressed the view that a “limiting principle” was required.⁵ Such a principle, it concluded, could be found in “the classic distinction between an ‘idea’ and the ‘expression’ of that idea.”⁶ It explained that this distinction followed from the copyright “axiom” that copyright protection extends “only to the particular expression of the idea and never to the idea itself.”⁷ The court correctly observed that copyright infringement could be found only where there had been copying of the expression of the copyrighted work and could not be based on the copying of the idea alone.⁸ From this, the court concluded that “two steps in the analytic process are implied.”⁹ The court explained that infringement required not only similarity of ideas but also similarity in the expression of those ideas.¹⁰ It called the determination of similarity of ideas an extrinsic test because “it depends not on the responses of the trier of fact, but on specific criteria which can be listed and analyzed.”¹¹ It listed as examples of such criteria “the type of artwork involved, the materials used, the subject matter, and the setting for the subject.”¹² The court further noted that, because the extrinsic test involved criteria that could be listed and analyzed, analytical dissection and expert

testimony would be appropriate under this part of the test.¹³

If there is substantial similarity in the ideas of the two works, then the Ninth Circuit held that “the trier of fact must decide whether there is substantial similarity in the expressions of the ideas so as to constitute infringement.”¹⁴ It called the second part of its two-part test the intrinsic test “because it does not depend on the type of external criteria and analysis which marks the extrinsic test.”¹⁵ The court explained that under the intrinsic test substantial similarity in expression would be determined by the response of the ordinary reasonable person.¹⁶ In contrast to the extrinsic test, the court stated that under the intrinsic test analytical dissection and expert testimony are not appropriate.¹⁷

In its defense, McDonalds argued that although it did not dispute that it copied the idea of plaintiffs’ Pufnstuff television series the expression of the idea in the two works was substantially different. To illustrate its point, McDonalds dissected the two works into their constituent elements of characters, setting and plot and emphasized the differences between these constituent elements in the two works.

By today’s standards, no one would have objected to McDonalds’ approach. But the Ninth Circuit rejected this approach, faulting McDonalds for “ignore[ing] the idea-expression dichotomy” described by the court.¹⁸ According to the *Krofft* court, McDonalds was attempting to apply an extrinsic test to, and analytically dissect, the expressive elements in the two works. This the court stated was inappropriate as applied to expressive elements. Rather, the court concluded that McDonalds must use the intrinsic test under which the expressive elements would not be dissected and instead would be analyzed subjectively under an ordinary reasonable person standard to determine if the McDonalds’ commercials captured the concept and feel of the Pufnstuff show.¹⁹

The *Krofft* court further noted that the intrinsic test was “uniquely suited for the trier of fact” and that the court would be “less likely to find clear error when the subjective test for copying of expression has been applied.”²⁰ The court therefore refused to overturn the jury verdict for plaintiffs and affirmed the judgment of the trial court.²¹

Several conclusions can be drawn from the *Krofft* opinion: First, the extrinsic test measures similarities in ideas, whereas the intrinsic test measures similarities in expression. Second, similarity in ideas is measured by an objective test, whereas similarity of expression is measured by a subjective test. Third, it is appropriate to utilize analytic dissection when analyzing similarity in ideas under the extrinsic test, but not when analyzing similarity in expression under the intrinsic test. Fourth, a reviewing court will be less likely to reverse a determination of similarity in expression than one of similarity in ideas. As we shall see, however, none of these principles articulated by *Krofft* has survived the decades that have followed.

THE PROBLEMS WITH KROFFT’S EXTRINSIC-INTRINSIC TEST SHOULD HAVE BEEN OBVIOUS FROM THE START

The reason so much of *Krofft* has failed to survive should have been obvious from the start. Although *Krofft* correctly took note of the idea-expression dichotomy in copyright jurisprudence, it failed to draw the appropriate conclusion from it. While it is of course an axiom of copyright law that copyright protection extends “only to the particular expression of the idea and never to the idea itself,” the conclusion that the *Krofft* court should have drawn from this distinction is that similarity of ideas is irrelevant to the issue of infringement. Instead, the *Krofft* court incorporated similarity of ideas into the first step of its two-step extrinsic-intrinsic test.

Such a misstep would not have been

fatal standing alone, but the *Krofft* court compounded its error by limiting analytic dissection to the extrinsic test and thus eliminating analytic dissection as a tool for analyzing similarity of expression. Analytic dissection in copyright analysis had its genesis in Judge Learned Hand’s famous “abstractions test.” Judge Hand described the various levels of abstraction contained within any literary work as follows:

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 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 of only 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.²²

Judge Hand’s abstractions test is a useful tool for distinguishing between the ideas of a work, which are not protectable by copyright, and the expression of those ideas, which are. However, analytic dissection goes beyond the mere identification of the ideas in a work—as distinguished from the expression of those ideas—and now incorporates the complete abstraction of a work into its constituent parts. Thus, one court has defined analytic dissection as breaking down a work into its various constituent elements and then focusing on each isolated element, or combination of elements, to the exclusion of all other elements.²³ As properly understood, analytic dissection is consequently an important preliminary step that must be performed before any comparison of two works can be performed. This is so because no comparison of ideas can be performed until the ideas underlying any two works can be identified and distinguished from the expression of those ideas. More important, since no copyright protection

extends to ideas, it is irrelevant to engage in any comparison of the ideas contained in any two works. The purpose of analytic dissection therefore is to isolate the ideas in any work so they can be *excluded* in the comparison step. Moreover, once the ideas have been identified and excluded, the remaining parts can be analyzed first for *protectability* under copyright law and then for a comparison between the *protectable* parts of each work. Hence, analytic dissection is an essential tool, not only under the extrinsic test—so that ideas can be identified—but also under the intrinsic test—so that *unprotectable* expression can be filtered or excluded before engaging in the comparison step.²⁴

THE TRANSFORMATION OF KROFFT'S EXTRINSIC-INTRINSIC TEST BEGAN WITH JASON V. FONDA

The problems with *Krofft's* analysis surfaced almost immediately, but it took several years before courts began to expressly recognize them. The first breach in the dam came in the opinion of the district court in *Jason v. Fonda*.²⁵ The problem arose when the district court was required to analytically dissect plaintiff's book entitled "Concomitant Soldier-Woman and War" which plaintiff accused defendants of infringing by producing and showing the motion picture "Coming Home." The district court attempted to apply *Krofft's* extrinsic test but stumbled when it came to dissecting the specific criteria to be compared under that test. It concluded that, "the criteria [under the extrinsic test] in this case might include such characteristics of a written work as plot, themes, dialogue, mood, setting, pace and sequence."²⁶ Although *Krofft's* extrinsic test is supposed to compare the ideas of two works, the criteria identified by the district court in *Jason* clearly included expressive elements such as dialogue, mood, setting, pace and sequence.²⁷ Thus, almost by accident, if not by conscious

design, expressive elements began to creep into the extrinsic test.

The emasculation of *Krofft's* extrinsic test continued unabated several years later when the Ninth Circuit cited *Jason* with approval in *Litchfield v. Spielberg*.²⁸ In *Litchfield*, the Ninth Circuit described the extrinsic test consistently with *Krofft*, stating that "[s]imilarity of ideas may be shown by an extrinsic test."²⁹ But in the same sentence the *Litchfield* court incorrectly noted that the extrinsic test "focuses on alleged similarities in the objective *details* of the work."³⁰ The word "details" is not commonly understood to be synonymous with the word "ideas." Indeed, the word "details" implies a level of expression inconsistent with ideas alone. *Litchfield* then described the "details" to be focused on under the extrinsic test as consisting of "plot, theme, dialogue, mood, setting, pace and sequence," relying on the district court's opinion in *Jason v. Fonda*.³¹ In the very next sentence, the *Litchfield* court acknowledged that under *Krofft* "[s]imilarity of expression depends on a subjective, intrinsic test," apparently completely oblivious to the fact that it incorporated several expressive elements—i.e., dialogue, mood, setting, pace and sequence—within the extrinsic test instead of the intrinsic test.

Once a panel of the Ninth Circuit had repeated the error of the district court in *Jason v. Fonda*, there was now no turning back. The next year, in *Berkic v. Crichton*,³² the Ninth Circuit continued the process of transforming the extrinsic test from one of comparing ideas to one of comparing expression in the following passage:

The test for "substantial similarity of ideas" compares, not the basic plot ideas for stories, but the actual concrete elements that make up the total sequence of events and the relationships between the major characters. The extrinsic test for similarity of ideas looks beyond the vague, abstracted idea of a general plot and instead "focuses on...the objective

details of the works.... The extrinsic test requires a comparison of plot, theme, dialogue, mood, setting, pace, and sequence."³³

Thus, under *Berkic's* reformulation of the extrinsic test, it has begun to look beyond mere ideas, and instead focused on "the objective details of the works." Again, however, the court did not acknowledge that it had redefined *Krofft's* original formulation of the extrinsic test as one focusing only on the general ideas of the works.

The transformation of the extrinsic-intrinsic test further evolved as a result of the Ninth Circuit's decision in *Aliotti v. R. Dakin & Co.*³⁴ The *Aliotti* court recognized that analytic dissection was a necessary step in the ability to analyze whether there is substantial similarity of expression, as opposed to substantial similarity of ideas. There, the court was confronted with a claim that defendants had infringed plaintiff's line of stuffed toy dinosaurs. Plaintiffs argued that the district court had erred in granting defendants' motion for summary judgment because the district court had engaged in analytic dissection of the dissimilar characteristics of the dolls. The Ninth Circuit agreed that it was error to analytically dissect the *dissimilarities* between the two doll lines, but it held that it was necessary to engage in analytic dissection of the *similarities*. It explained its reasoning as follows:

The inquiry into similarity of expression is modified by a line of cases recognized by *Krofft* but never satisfactorily integrated into the two-part *Krofft* framework. No substantial similarity of expression will be found when "the idea and its expression are...inseparable," given that "protecting the expression in such circumstances would confer a monopoly of the idea upon the copyright owner".... To the extent that it is necessary to determine whether similarities result from unprotectable expression, it is appropriate under *Krofft's* intrinsic test to perform ana-

lytic dissection of *similarities*. Although even unprotectable material should be considered when determining if there is substantial similarity of expression, no substantial similarity may be found *under the intrinsic test* where analytic dissection demonstrates that all similarities in expression arise from the use of common ideas.³⁵

The *Aliotti* court therefore appropriately recognized the need to separate unprotectable expression from protectable expression under *Krofft's intrinsic test*—a step overlooked by *Krofft*—because no finding of copyright infringement could be based on similarity in the unprotectable expression of two works.³⁶ Hence, *Krofft's* formulation of the extrinsic-intrinsic test was rapidly eroding: expressive elements were being considered in applying the extrinsic test and analytic dissection was being employed with respect to elements of expression under the intrinsic test.

THE DEATH KNELL OF KROFFT'S ORIGINAL FORMULATION OF THE TEST CAME IN SHAW V. LINDHEIM

The death knell of *Krofft's* extrinsic-intrinsic formulation came in 1990 in the case of *Shaw v. Lindheim*.³⁷ In *Shaw*, the plaintiff brought suit against the developers of the television show, “Equalizer,” which plaintiff claimed infringed his script of the same name. After describing *Krofft's* extrinsic-intrinsic test, the *Shaw* court took note of the transformation in the extrinsic component of the test in subsequent Ninth Circuit cases. It observed that in analytically dissecting literary works under the extrinsic test, courts had identified “‘plot, themes, dialogue, mood, setting, pace, and sequence’ as extrinsic test criteria.”³⁸ Because these criteria included “virtually every element that may be considered concrete in a literary work,” the *Shaw* court concluded that “the extrinsic test as applied to books, scripts, plays, and motion pictures can no longer be seen as a test for mere similarity of ideas.”³⁹ It

therefore suggested that the two tests were more appropriately described as “objective and subjective analyses of *expression*.”⁴⁰ Hence, *Shaw* correctly recognized that only the *expression* in a literary work is relevant for purposes of copyright analysis and that a comparison of ideas was irrelevant. However, it did not eliminate the intrinsic test; rather, it transformed the intrinsic test into a *subjective* comparison of expression.⁴¹ Having concluded that the intrinsic test was purely subjective in nature, the court was compelled also to conclude that a finding of non-infringement on summary judgment could not be based on the intrinsic test alone.⁴² Accordingly, the court held that satisfaction of the extrinsic test automatically suffices to create a genuine issue of material fact and precludes summary judgment in favor of the defendant.⁴³

In *Brown Bag Software v. Symantec Corp.*,⁴⁴ the Ninth Circuit further refined the extrinsic test, emphasizing that analytic dissection should be used as a tool “for comparing not only ideas but also expression.”⁴⁵ More important, *Brown Bag* stressed that analytic dissection is appropriate not only with respect to the analysis of substantial similarity but also with respect to the element of ownership and specifically with respect to the scope of the copyright so owned. That is, *Brown Bag* stands for the proposition that analytic dissection is also useful for the purpose of determining whether any similarities between two works result from protectable or unprotectable expression.⁴⁶ Thus, *Brown Bag* reinforced the similar conclusions that had been reached earlier in the Ninth Circuit’s *Aliotti* decision.

In addition, *Brown Bag* reaffirmed the principle that the extrinsic test had been transformed into an analysis of expression, and not one exclusively of ideas. As *Brown Bag* explained, the “extrinsic test now includes some analysis of expression.”⁴⁷ Specifically, the court noted that as to literary works the extrinsic test has been expanded to include analytic dissec-

tion of such expressive elements as “plot, theme, characters and dialogue.”⁴⁸ Of course, other courts have added to the extrinsic test the additional elements of setting, pace, mood and characters so that virtually no expressive elements are now excluded from the extrinsic test.⁴⁹

The analysis of substantial similarity was further refined in *Apple Computer, Inc. v. Microsoft Corp.*,⁵⁰ in which Apple sued alleging infringement of the graphic user interface or GUI of its computer programs. First, the court noted that computer programs, including the non-literal elements of such programs as well as the literal elements of source code and object code, “are subject to the same process of analytic dissection as are other works.”⁵¹ Second, it articulated an appropriate framework for analyzing the issue of substantial similarity in cases involving computer programs, adopting a three-part test: 1) identification of similarities; 2) analytic dissection; and 3) comparison.⁵² These steps are similar to those of the “abstraction-filtration-comparison” test adopted by other circuits in analyzing substantial similarity of computer programs.⁵³ Under the Ninth Circuit’s version of the abstraction-filtration-comparison test, the court must first identify the sources of any alleged similarities between the two works. Using analytic dissection, and well-settled copyright doctrines,⁵⁴ the court must then examine each allegedly similar element for protectability under copyright law and filter out all unprotectable elements.⁵⁵ Finally, under the last step, the court must compare the protectable elements, making sure that it excludes from its comparison all unprotectable elements filtered out under the previous step.⁵⁶

THE MODERN VERSION OF THE EXTRINSIC-INTRINSIC TEST BEARS NO RESEMBLANCE TO KROFFT'S ORIGINAL FORMULATION

Modern decisions have since fully integrated expression into the extrinsic test

and accepted the use of analytic dissection as a tool for distinguishing between protected and unprotected expression. Thus, in *Rice v. Fox Broadcasting Corp.*,⁵⁷ the Ninth Circuit recently described the extrinsic test as follows:

As we have previously stated, the extrinsic test is an objective measure of the “articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events.” In applying the extrinsic test, we must distinguish between the protectable and unprotectable material because a party claiming infringement may place “no reliance upon any similarity in expression resulting from unprotectable elements.”⁵⁸

The modern formulation of the extrinsic-intrinsic test therefore has come to resemble the abstraction-filtration-comparison test adopted by courts in the analysis of computer programs. In fact, the abstraction-filtration-comparison test is a more accurate description of modern substantial similarity analysis even as applied to literary works since under the modern extrinsic test a literary work must first be abstracted through the use of analytic dissection and then filtered in order to identify and exclude unprotectable elements. Finally, under the intrinsic test the works must be compared subjectively for similarity in their total concept and feel. As a result, the extrinsic-intrinsic test has outgrown its ability to accurately describe modern substantial similarity analysis in copyright cases. Instead, since *Shaw*, the courts of the Ninth Circuit are in effect applying the abstraction-filtration-comparison test to literary works but continue to use the label of the extrinsic-intrinsic test. Given that the extrinsic-intrinsic label no longer fits, the Ninth Circuit should abandon this obsolete label and trade it in for a new and better fitting one. ©

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Endnotes

1. The extrinsic-intrinsic test is usually held to be applicable to most literary works, such as books, scripts, plays and motion pictures. But it has also been applied to musical compositions, artwork, and utilitarian works. See, e.g., *Swirsky v. Carey*, 376 F.3d 841, 845–49 (9th Cir. 2004)(musical compositions); *Cavalier v. Random House, Inc.*, 297 F.3d 815, 825–26 (9th Cir. 2002)(art work); *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1475–76 (9th Cir.), cert. denied, 506 U.S. 869 (1992)(utilitarian works).
2. 562 F.2d 1157 (9th Cir. 1977).
3. *Id.* at 1162.
4. *Id.*
5. *Id.* at 1163.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 1164.
11. *Id.*
12. *Id.* Although *Krofft* involved a literary work, its example of criteria appears to be more applicable to a work of art such as a painting or sculpture. This perhaps can be explained by the fact that the *Krofft* opinion referred to a statute of a nude to illustrate many of its points. *Id.* at 1163–64.
13. *Id.* at 1164
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 1165.
19. *Id.* at 1165–67.
20. *Id.* at 1166.
21. *Id.*
22. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), cert. denied, 282 U.S. 902 (1931).
23. *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1298 (9th Cir. 1997). See also *Swirsky v. Carey*, 376 F.3d at 845.
24. See, e.g., *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir.

1994)(adopting a three-step test for analyzing infringement of computer software programs, consisting of identification of similarities, analytic dissection of the works, and then comparison of only the protectable elements of each work), cert. denied, 513 U.S. 1184 (1995).

25. 526 F. Supp. 774 (C.D. Cal. 1981), *aff'd*, 698 F.2d 966 (9th Cir. 1982).
26. *Id.* at 777.
27. At the most general level of abstraction, criteria such as plot and themes would probably fall within the category of ideas, and courts have subsequently had difficulty drawing the line between idea and expression in applying such elements.
28. 736 F.2d 1352, 1356 (9th Cir. 1984), cert. denied, 470 U.S. 1052 (1985).
29. *Id.*
30. *Id.*
31. *Id.*
32. 761 F.2d 1289 (9th Cir.), cert. denied, 474 U.S. 826 (1985).
33. *Id.* at 1293.
34. 831 F.2d 898 (9th Cir. 1987).
35. *Id.* at 901.
36. 17 U.S.C. § 102(b); *Baker v. Seldin*, 101 U.S. 99 (1879).
37. 919 F.2d 1353 (9th Cir. 1990).
38. *Id.* at 1356–57. It also observed that other courts had added “characters” to the list and transformed “sequence” into “sequence of events.” *Id.* at 1357.
39. *Id.*
40. *Id.*
41. Because the intrinsic test was subjective in nature, the court commented that judicial determination under the intrinsic test had become “devoid of analysis.” *Id.* Given that the test is subjective, it is also impossible for a reviewing court to review a determination under the intrinsic test and thus a trial court’s determination of similarity under the intrinsic test is virtually unreviewable by an appellate court.
42. *Id.* at 1359.
43. *Id.*
44. 960 F.2d 1465 (9th Cir.), cert. denied, 506 U.S. 869 (1992).
45. *Id.* at 1475.
46. *Id.* at 1475–76.
47. *Id.* at 1476–77.
48. *Id.*
49. See *Shaw*, 919 F.2d at 1356–57. It should be noted that *Brown Bag* did not involve a literary work; rather, it addressed the issue of substantial similarity in the context of computer programs. Nevertheless, it recognized that analytic dissection was as important, if not more so, in the determination of substantial similarity as applied to such works and that analytic

dissection should not be limited to literary works.

50. 35 F.3d 1435 (9th Cir. 1994), *cert. denied*, 513 U.S. 1184 (1995).
51. *Id.* at 1445.
52. *Id.* at 1443.
53. *See, e.g., Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 706–11 (2d Cir. 1992); *Gates Rubber Co. v. Bando Chem. Indus.*, 9 F.3d 823, 834 (10th Cir. 1993); *Engineering Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1342–43 (5th Cir. 1994); *Lotus Development Corp. v. Borland International, Inc.*, 49 F.3d

807 (1st Cir. 1995), *aff'd*, 516 U.S. 233 (1996).

54. These well-settled copyright doctrines would include the familiar idea-expression dichotomy and such doctrines as merger, scenes-à-faire, public domain, and originality. *See Apple Computer*, 35 F.3d at 1443–45.
55. *Id.* at 1443.
56. *Id.* at 1446. The *Apple* court also noted that before performing the comparison the court must first decide the appropriate level of protection to which the work is entitled, granting “broad” protection

to works containing a high degree of creativity and “thin” protection to works exhibiting lesser degrees of creativity such as factual works and compilations of uncopyrightable elements. *Id.* at 1446–47.

57. 330 F.3d 1170 (9th Cir. 2003).
58. *Id.* at 1174 (quoting *Apple Computer Corp. v. Microsoft Corp.*, 35 F.3d at 1446). *See also Metcalf v. Bochco*, 294 F.3d 1069, 1073 (9th Cir. 2002); *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822–23 (9th Cir. 2002); *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042 (9th Cir. 1994).

***New Matter* Author Submission Guidelines**

1. Articles should be on topics of interest to a significant number of IP lawyers and in the range of 1500–6000 words long. Acceptable types of articles include reasoned opinion, practice tips, and scholarly analysis; they must be within the bounds of good taste and must have accurate references. Once within these guidelines, acceptance will depend on the flow of other articles, timeliness, editorial schedule, etc.
2. Contact any of the editors to discuss whether your topic fits NM editorial policy, schedule, etc. (e.g., analysis of a recent case may have already been accepted.)
3. Authors are encouraged summarize in the initial paragraphs what will be covered and generally why it is important. They should also make use of headings to emphasize the main issues and key contours of the article. Most readers welcome a roadmap and highway markers.
4. Provide a draft to your contact editor in electronic and hard copy formats. Electronic copy should be in MS Word or WordPerfect (call if there is a problem; note the current editorial preference is MS Word).
5. Include:
 - Name, affiliation, address
 - Contact phone and e-mail
 - One paragraph summary of article and its relevance

Review may take 2–6 weeks depending on article length, topic, etc.

6. Upon acceptance: Supply author headshot(s), ideally 5"x7" glossy black and white with light-colored background. If that is unavailable, we can often extract a usable image from any photo with reasonable contrast and a light background. High-resolution electronic images (.tif or .eps) are encouraged, preferably 300 dpi at 2 $\frac{1}{4}$ " wide. Provide a bio of up to 50 words.