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Volume 6 | Issue 2

Article 4

March 1999

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Recommended Citation

Douglas Y'Barbo, *The Origin of the Contemporary Standard for Copyright Infringement*, 6 J. INTELL. PROP. L. 285 (1999).

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THE ORIGIN OF THE CONTEMPORARY STANDARD FOR COPYRIGHT INFRINGEMENT

*Douglas Y'Barbo**

I. INTRODUCTION

Copyright is a federal legal regime of exceptional influence on both American art and commerce. Literature, film, music, sculpture, architecture, and software all rely primarily upon federal copyright law for protection against unauthorized copying, which if left unrestrained, would unquestionably squelch the incentive to create or to invest in such creation.

Nevertheless, the legal standard relied upon to determine copyright infringement is deeply fissured between the two major copyright courts—the Second and Ninth Circuits.¹ The remaining circuits are apparently unaware of this fissure, as evidenced by the fact that several of them apply both tests interchangeably. Additionally, the infringement test is by consensus a complicated, time-consuming, multi-pronged test, containing vague and redundant nomenclature, which for these reasons alone, resists straightforward comparison of the two tests. No serious attempt has been made in the scholarly literature to reconcile or to harmonize these two disparate standards, nor to favor one over the other, despite the urgent need to do so.² This is the focus of this Article.

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¹ The two courts most significant (past, present, and future) to the development of copyright law are the Second and Ninth Circuits. The major dichotomy in the infringement standard also occurs between these two circuits. Granted, the legal standards for copyright infringement may differ among the other regional circuits; nevertheless, in copyright law, the operative legal standards are generally borrowed from the Second and Ninth Circuits.

² The only critical comparison in the scholarly literature that I have been able to locate is: Aaron M. Broaddus, *Eliminating the Confusion: A Restatement of the Test for Copyright Infringement*, 5 J. ART & ENT. L. 43 (1995). However, this article does not discuss the positions of circuits other than the Second and Ninth, nor does it discuss what I believe to be the most significant difference between the two standards—the procedural disparity that arises from the Second Circuit's "derivation" requirement, which is not part of the Ninth

More particularly, the purpose of this Article is to provide a thorough explanation of these two legal standards with particular emphasis upon the points of disparity, its source and its significance. To accomplish these objectives, I shall trace the development of the two standards from their origin to the present, with particular emphasis on their historical point of divergence. As we shall see, although the Second and Ninth Circuits currently apply different standards for copyright infringement, the two circuits actually applied the same test many years ago. Indeed, the current Ninth Circuit standard is a direct descendant from a twenty-year-old Second Circuit decision. At about that time, a Ninth Circuit panel inadvertently misread that Second Circuit decision (though it purported to follow it), which resulted in a comprehensive recension of the Ninth Circuit standard for copyright infringement. Though the Ninth Circuit test is a sincere imitation of the venerable Second Circuit test, the two are in fact sharply distinct. They remain so today.

I shall also classify the infringement tests applied in the remaining circuits according to whether they apply either the Second or Ninth Circuit's standards; as well as demonstrate that although the Second/Ninth Circuit distinction is substantial, it is essentially ignored by the remaining circuits, who continue to apply the two tests more or less interchangeably. Finally, a nominally revised (actually not so much revised as clarified or just relabeled) infringement standard is offered. This revised standard is shown in Figure -E-.³

II. THE SECOND CIRCUIT'S STANDARD FOR COPYRIGHT INFRINGEMENT

The purpose of this section and the next is to explain in detail the tests for copyright infringement presently relied upon in the Second and Ninth Circuits. These sections rely closely upon Figures -A- (Second Circuit)⁴ and -C- (Ninth Circuit).⁵ The reader

Circuit's test.

³ See *infra* p. 322 (Figure -E-).

⁴ See *infra* p. 318 (Figure -A-).

⁵ See *infra* p. 320 (Figure -C-).

who is already familiar with these standards is encouraged to skip ahead to the section entitled, "A Comparison."⁶

The contemporary legal standard for copyright infringement applied in the Second Circuit is shown in Figure -A-. The acknowledged progenitor of the contemporary standard is *Arnstein v. Porter*.⁷ Indeed, the current standard applied in the Second Circuit is virtually identical to the test recited in that 1946 decision.⁸ According to the Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*,⁹ a prima facie case of copyright infringement is established by proving ownership of a valid copyright and "[c]opying of constituent elements of the work that are original."¹⁰ Or, in the Second Circuit's own words: "[c]opyright infringement is established when the owner of a valid copyright demonstrates unauthorized copying."¹¹ The *Feist* standard is depicted in Figure -B-.¹² At this level of abstraction,

⁶ See *infra* Part IV.

⁷ 154 F.2d 464, 68 U.S.P.Q. (BNA) 288 (2d Cir. 1946).

⁸ *Id.* at 468. Though *Arnstein* is viable authority in the Second Circuit with respect to the legal standard for copyright infringement which it recites, this case has been overruled with respect to its holding on the standard for summary judgment in copyright infringement suits. Specifically, in *Arnstein*, the Second Circuit reversed the trial court's ruling in the defendant's favor on summary judgment, reciting its infamous "slightest doubt" standard: "[t]he principal question on this appeal is whether the lower court, under Rule 56, properly deprived plaintiff of trial of his copyright infringement action. The answer depends upon whether 'there is the slightest doubt as to the facts.'" *Id.* In fact, this standard has been repudiated everywhere, including the Second Circuit. See, e.g., *Denker v. Uhry*, 820 F. Supp. 722, 729, 26 U.S.P.Q.2d (BNA) 1756, 1762 (S.D.N.Y. 1992) ("The *Arnstein* court's conclusions regarding summary judgment, however, have been undermined by recent case law both on summary judgment in general and summary judgment in copyright actions in particular. The mere existence of disputed factual issues is no longer sufficient to defeat a motion for summary judgment.") (citing, *inter alia*, *Knight v. United States Fire Ins. Co.*, 804 F.2d 9, 11-12 (2d Cir. 1986)). See also, *Beal v. Lindsay*, 468 F.2d 287, 291 (2d Cir. 1972) (stating that the *Arnstein* "slightest doubt" standard is no longer good law). The Ninth Circuit has relied heavily upon the liberalized summary judgment standards in film-adaptation disputes. Douglas Y'Barbo, *Aesthetic Ambition Versus Commercial Appeal: Adapting Novels to Film and the Copyright Law*, 10 ST. THOMAS L. REV. 299, 379 (1998). Again though, one should not for a moment mistake *Arnstein's* demise in this limited aspect for a more general repudiation of its core holding that set the standard for infringement.

⁹ 499 U.S. 340, 18 U.S.P.Q.2d (BNA) 1275 (1991).

¹⁰ *Id.* at 361.

¹¹ *Castle Rock Entertainment, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 137, 47 U.S.P.Q.2d (BNA) 1321, 1324 (2d Cir. 1998) (quoting *Repp v. Webber*, 132 F.3d 882, 889, 47 U.S.P.Q.2d (BNA) 1285, 1291 (2d Cir. 1997)).

¹² See *infra* p. 319 (Figure -B-).

the standard is not useable; it requires further refinement before it can be applied. The inter-circuit disparity that is the focus of this Article resides in the definition of the latter requirement, “unauthorized copying” (the bottom-most box in Figure -B-).

In the Second Circuit, the second prong of the *Feist* standard, “unlawful copying” (the first is establishing ownership of a valid copyright) is deliberately separated into two requirements: “a plaintiff must first show that his work was actually copied . . . [and] then must show that the copying amounts to an improper or unlawful appropriation.”¹³ This is depicted in Figure -A-. Hence, “unlawful copying” is split into two elements: “copying” and “improper appropriation.” The first of these can be shown either by direct evidence of copying (the accused infringer is caught red-handed creating their text with the plaintiff’s right beside him) or by evidence that the accused infringer had access to the plaintiff’s text (a reasonable opportunity to view it) plus some similarities between the two texts that is probative that the accused infringer copied (for example, a common misspelled word). If, and only if, the plaintiff traverses this prong, must he then show that the copying rises to the level of an “improper appropriation.” Mere copying (or derivation) becomes improper appropriation (hence copyright infringement) if the amount borrowed was substantial, and if it was copyrightable.

So the Second Circuit requires that the copyright plaintiff *first* prove that the accused text is derived from the plaintiff’s, and then that the material borrowed qualifies for copyright protection, that is, that the borrowing amounts to an “improper appropriation.”

The Second Circuit’s two prongs of the “unlawful copying” requirement and their relationship to one another require careful explanation. These two prongs are *neither* distinct requirements nor two components that together comprise a whole. Rather the first of these components, “actual copying,” is actually subsumed within the second, “improper appropriation.” Again, “actual copying” means that the accused text is derived from the plaintiff’s. “Improper appropriation” means that the material borrowed from the plaintiff must be copyrightable. Obviously, if the borrowed

¹³ *Castle Rock*, 150 F.3d at 137 (quoting *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 139-40, 22 U.S.P.Q.2d (BNA) 1811, 1819 (2d Cir. 1992)).

material is copyrightable, then it is, by definition, original to the plaintiff; hence the accused text was by implication derived from the plaintiff's text. Put another way, the "actual copying" prong ("derivation") could be disposed of entirely, and in theory at least, one would arrive at the same result. I shall discuss in a moment the practical consequences of doing this.

Therefore, in the Second Circuit, the plaintiff must show first that the accused text was derived from the plaintiff's text. Next, the plaintiff must show that *at least some* of the material that the defendant borrowed qualifies for copyright protection—if so, then copying becomes "unlawful copying" (Second Circuit's term) or "unauthorized copying" (Supreme Court's term). The first of these requirements, derivation, can be shown in one of two ways: either the plaintiff can provide direct evidence that the defendant copied from the plaintiff's text, this is very rare and almost requires an outright admission by the defendant or something like an admission, or the plaintiff can offer evidence of access—defined roughly as the "opportunity to view"—plus evidence that is probative of derivation ("probative similarity"). Evidence of access can be generally placed into one of three categories: (1) chain-of-events¹⁴ (e.g., the plaintiff gave the text to someone who gave it to defendant's personal secretary), (2) widespread dissemination¹⁵ (e.g., bestseller status), or (3) purely circumstantial¹⁶ (e.g., defendant prepared the accused text in less than half the time that it took plaintiff, defendant has a history of plagiarizing, etc.).

Probative similarity, which along with access proves derivation, is a simple concept.¹⁷ It is easy to understand and easy to prove.

¹⁴ See, e.g., *Moore v. Columbia Pictures Indus., Inc.*, 972 F.2d 939, 942, 23 U.S.P.Q.2d (BNA) 1864, 1866 (8th Cir. 1992); *Meta-Film Assoc. Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1358, 222 U.S.P.Q. (BNA) 211, 220 (C.D. Cal. 1984).

¹⁵ See, e.g., *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 944 F.2d 971 (2d Cir. 1991); *Cholvin v. B. & F. Music Co.*, 253 F.2d 102, 116 U.S.P.Q. (BNA) 491 (7th Cir. 1958).

¹⁶ See, e.g., *Toksvig v. Bruce*, 181 F.2d 664, 667, 85 U.S.P.Q. (BNA) 339, 341 (7th Cir. 1950); *Lauratex Textile Corp. v. Allton Knitting Mills, Inc.*, 517 F. Supp. 900, 903, 214 U.S.P.Q. (BNA) 203, 204 (S.D.N.Y. 1981).

¹⁷ The late Professor Alan Latman was the first to suggest this change in nomenclature. Alan Latman, "Probative Similarity" as Proof of Copying: *Toward Dispelling Some Myths in Copyright Infringement*, 90 COLUM. L. REV. 1187 (1990). Prior to Latman's article, the term "substantial similarity" appeared *twice* in the Second Circuit's infringement test: once in the copying prong, and once in the illicit copying prong, see *infra* page 318 (Figure -A-). See, e.g., *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90, 190 U.S.P.Q. (BNA) 387,

The evidence, which consists of portions of the accused text compared with the plaintiff's, can be either protectable or unprotectable material. Additionally, as one might infer from this discussion, analytic dissection—performed either by experts or by counsel—is permitted to show probative similarity. In contrast, expert testimony is *not* permitted in the second prong of the unlawful copying requirement, “improper appropriation.” Note also that to show derivation, the plaintiff need not show that the two texts are “substantially similar,” in any sort of quantitative sense; indeed, highly probative evidence of derivation may consist of a single phrase, if there is no other plausible source for that phrase, other than the plaintiff's text. The point is this: probative similarity and substantial similarity are different concepts. This point will be discussed later.

If the plaintiff successfully proves that the accused text is derived from his or her text, then the plaintiff must then show that the copying amounts to “improper appropriation” (the box directly below the “actual copying” one in Figure -A-). Mere copying or derivation might not rise to the level of improper appropriation for three reasons. First, the material copied might not qualify for copyright protection—either because the plaintiff is not the author of it (it is not original) or because it is ineligible for copyright protection by statute or common law decision: for example, idea/expression dichotomy, scenes-a-faire, etc. Second, the copying may be quantitatively insignificant, that is, it is *de minimis*.¹⁸ Third, the material copied may be quantitatively significant and it may be protectable expression, yet it may still not give rise to infringement because: (1) the “ordinary observer” overlooks the similarity; or (2) the copying is judged a “fair use” since it is unlikely to harm the market (or any probably unexploited market)

390 (2d Cir. 1976) (“[Copying] is usually proved by circumstantial evidence of access to the copyrighted work and substantial similarities as to protectible material in the two works.”). But a few years after Latman's article, the (not trivial) relabeling he suggested was firmly reticulated in Second Circuit law. See, e.g., *Castle Rock*, 150 F.3d at 137 (“Actual copying may be established ‘either by direct evidence of copying or by indirect evidence, including access to the copyrighted work, similarities that are probative of copying between the work, and expert testimony.’”) (citing *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 139-40, 22 U.S.P.Q.2d (BNA) 1811, 1819 (2d Cir. 1992)).

¹⁸ *Castle Rock*, 150 F.3d at 138.

for the plaintiff's text.

These three safe harbors are actually subsumed within the ordinary observer (or audience impression) standard, which is the test used to determine improper appropriation. The ordinary observer test is a deliberately un-analytical, almost superficial glance at the two texts side-by-side: "whether the 'ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.'"¹⁹ The only restriction imposed upon the ordinary observer is that she limit her comparison to the copyrightable features of the plaintiff's text: "This test for illicit copying to prove infringement of another's copyright demands that the similarities relate to protectible material. . . ."²⁰

This concludes my discussion of the legal standard for copyright infringement currently applied by courts in the Second Circuit. Again, as evidenced by Figure -A-,²¹ the test has four essential requirements: ownership of a valid copyright, access, similarity that is probative of derivation, and substantial similarity as judged by the casual observer. As we shall see, the Ninth Circuit's test also possesses these four requirements, though subsumed within a different structure.

III. THE NINTH CIRCUIT'S STANDARD FOR COPYRIGHT INFRINGEMENT

The current standard used in the Ninth Circuit, as recited in *Apple Computer, Inc. v. Microsoft Corp.*,²² a recent decision in that circuit, is shown in Figure -C-.²³ As evidenced by Figure -C- in comparison with Figure -A-, the two primary prongs, "ownership" and "unlawful copying," are identical in both the Second and Ninth

¹⁹ *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 765, 19 U.S.P.Q.2d (BNA) 1418, 1422 (2d Cir. 1991) (quoting *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489, 124 U.S.P.Q. (BNA) 154, 155 (2d Cir. 1960)).

²⁰ *Folio Impressions*, 937 F.2d at 765.

²¹ See *infra* p. 318.

²² 35 F.3d 1435, 1442, 32 U.S.P.Q.2d (BNA) 1086, 1091 (9th Cir. 1994). I shall also rely upon *Shaw v. Lindheim*, 919 F.2d 1353, 1356 (9th Cir. 1990), since that case recites certain portions of the infringement standard with slightly greater precision than does *Apple Computer*.

²³ See *infra* p. 320.

Circuit tests. The disparity relates to requirements subsumed within the second of the two fundamental requirements, the “unlawful copying” requirement.

According to *Apple Computer*, unlawful copying requires that the plaintiff offer “circumstantial evidence of access and substantial similarity of both the general ideas and expression between the copyrighted work and the allegedly infringing work.”²⁴ “Substantial similarity” in turn is proved by a two-part test: an “extrinsic” or “objective” test and an “intrinsic” or “subjective” test.²⁵ Again, the copyright plaintiff in the Ninth Circuit must first prove access, though unlike the plaintiff in the Second Circuit, he does not have to prove probative similarity. Indeed, the sharp separation between derivation and improper appropriation—the cornerstone of the *Arnstein* test²⁶—is conspicuously absent in the Ninth Circuit’s test. Thus, the Ninth Circuit plaintiff proves access, then proceeds directly to the substantial similarity requirement. Under the objective test, the first of the two tests comprising the substantial similarity requirement, the plaintiff’s text is divided into both protectable and unprotectable elements and compared element-by-element with the accused text.²⁷ According to various Ninth Circuit decisions, the purpose of this objective test is to determine the *scope* of the plaintiff’s copyright: “[a]nalytic dissection [that is, the objective test] is relevant not only to the copying element of a copyright infringement claim, but also to the claim’s ownership element. One aspect of the ownership element is the copyrightability of the subject matter and, more particularly, the scope of whatever copyright lies therein.”²⁸ So, once the scope of the plaintiff’s copyright is determined, the only question left is to determine whether the accused text—or some material part of it—lies within that scope. Apparently that determination is made in the objective test as well, since it involves a detailed, analytical

²⁴ *Apple Computer*, 35 F.3d at 1442 (citing *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1472, 22 U.S.P.Q.2d (BNA) 1429, 1434 (9th Cir. 1992)).

²⁵ *Shaw*, 919 F.2d at 1356.

²⁶ See *supra* notes 7-8 (discussing *Arnstein*).

²⁷ Thus, for instance, in the case of literary texts, the objective test examines a more-or-less predetermined set of components: plot, theme, characters, and dialogue. *Brown Bag Software*, 960 F.2d at 1477 (citing *Shaw*, 919 F.2d at 1356-57).

²⁸ *Brown Bag Software*, 960 F.2d at 1476.

“comparison” of the two texts.²⁹

Next, the court proceeds under the Ninth Circuit standard to the subjective test. Under this test, the ordinary observer—deliberately eschewing an analytical perspective—assesses the *overall* similarity of the two texts. In light of the thorough analysis that comprises the intrinsic test, the extrinsic test is difficult to justify. For instance, in the intrinsic test, the features common to both texts are identified and then assessed for copyrightability. Thus, by the completion of this test, the fact finder knows whether the accused text contains protectable expression owned by the plaintiff (and

²⁹ A critical examination of the Ninth Circuit’s test raises this question: What is the purpose of the subjective test? Its ostensible, or stated purpose is to assess the overall similarity of the two texts, but what is not clear is why that is necessary once the fact finder has performed the objective test. In the objective test—analogue, though not identical to the Second Circuit’s “probative similarity” prong—the text-in-suit and the accused text are placed side-by-side. Then the protectability of the elements common to both texts are broken down, element-by-element, and the protectability of each element is assessed. Again, the purpose of this test appears to be two-fold: (1) to determine the *scope* of the plaintiff’s copyright, and (2) to determine whether the accused text contains any protectable expression from the plaintiff’s text. See *id.* (“Analytic dissection [a.k.a. “the objective test”] is relevant not only to the copying element of a copyright infringement claim, but also to the claim’s ownership element. One aspect of the ownership element is the copyrightability of the subject matter and, more particularly, the scope of whatever copyright lies therein. . . . *Data East* teaches that the source of the similarity must be identified and a determination made as to whether this source is covered by plaintiff’s copyright.”) (citing *Data East USA, Inc. v. Epyx, Inc.*, 862 F.2d 204, 209, 9 U.S.P.Q.2d (BNA) 1322, 1326 (9th Cir. 1988)). Once the objective test is applied, it is not clear what is left to do to determine infringement. For instance, suppose that execution of the objective test reveals that the accused text contains several copyrightable elements from the plaintiff’s text. Aside from fair use—which does not destroy a *prima facie* case of infringement, but rather is an affirmative defense to an infringement charge, and in any event is rarely invoked in the case of fictional works—is that not the end of the matter? Put another way, the presence of the subjective test—a.k.a., the “audience” or “ordinary observer” test—suggests that an accused’s text may contain substantial protectable subject matter from the plaintiff’s text, yet still not infringe. This must be true, otherwise there would be no need for the subjective test. Indeed, one panel in the Ninth Circuit remarked that the test is “virtually devoid of analysis, for the intrinsic test has become a mere subjective judgment as to whether two literary works are or are not similar.” *Shaw*, 919 F.2d at 1357 (citing *Berkic v. Crichton*, 761 F.2d 1289, 1294, 226 U.S.P.Q. (BNA) 787, 790 (9th Cir. 1985), as a case “reaching a result under the intrinsic test in one paragraph”). Perhaps the subjective test embeds within the infringement standard the concept that a text, even though it copied protectable expression from another text, still does not infringe that text if the average consumer would not *recognize* meaningful similarity (e.g., derivation). This is a plausible explanation: it fits the data, is not contradicted by any of it, and is not unnecessarily complicated. Yet for this particular datum, a simpler explanation exists, whose source is the historical development of the current Ninth Circuit infringement standard.

since protectable expression is by definition original to the plaintiff, then that implicitly proves that the accused text is *derived from* the plaintiff's). Provided the amount of protectable expression borrowed traverses some *de minimis* threshold, what more is needed to establish copyright infringement?

Yet the Ninth Circuit's test—just like the Second Circuit's—permits the accused infringer who borrowed substantial protectable expression to exculpate himself if the casual observer would not recognize the accused text as having been derived from the plaintiff's text. Put another way, merely borrowing some nontrivial, even significant, amount of protectable expression from another's text does not necessarily make one an infringer. If the two texts appear different enough to conceal the similarities from the deliberately unreflective impression of the ordinary observer, then the accused infringer may borrow with impunity.

IV. A COMPARISON OF THE SECOND AND NINTH CIRCUITS' STANDARDS FOR COPYRIGHT INFRINGEMENT

A. INTRODUCTION

If the Second and Ninth Circuit standards are in fact identical, then their disparate vernacular and structure need to be reconciled. And if they are indeed different, then the implications that flow from the differences need to be understood—with one standard selected over the other.

Two legal standards can differ from one another in two essential ways: content/substance or procedure. As we shall see, the Ninth Circuit's test has the same essential requirements as the Second Circuit's standard, though the requirements have been complexly reshuffled, almost beyond recognition, compared with its Second Circuit progenitor. Hence, the two legal standards discussed in this Article have roughly the same content; indeed, their differences relate primarily to structure, which in turn confers a procedural distinction, with significant consequences.

As evidenced by the preceding discussion (Figures -A- versus -C-), the two tests are at least facially different (for example, the Second Circuit has no "objective" nor "subjective" tests). There are two primary differences between the circuit tests under which all other

lesser differences are subsumed. First, while the Second Circuit extracts from the “unlawful copying” prong, a separate derivation requirement, the Ninth Circuit test includes no such distinction; instead, derivation and copying copyrightable material are blended into a single inquiry, “substantial similarity.” Second, while the Ninth Circuit divides the substantial similarity inquiry into two components, an objective and a subjective test, the Second Circuit’s substantial similarity inquiry has a single component.

Nevertheless, upon closer inspection by displaying and comparing the two standards graphically, Figures -A-³⁰ and -C-³¹ they may not be so different. Most significantly, they have identical requirements, which viewed piecemeal, appear at different points in the test, and are sometimes performed with different endpoints in mind. More specifically, the *Arnstein* test³² depicted in Figure -A-³³ has four specific requirements (the elements appearing at the ends of the tree): ownership, access, an analytical test (probative similarity), and a subjective test (substantial similarity based on an audience impression). Likewise, the *Apple Computer* test³⁴ depicted in Figure -C-³⁵ also has four requirements: ownership, access, an analytical test (the objective test), and a subjective test.

The ownership and access requirements are not discernibly different between the two circuits. That leaves the latter two requirements: probative similarity and substantial similarity (Second Circuit) and the objective test and the subjective test (Ninth Circuit). As I shall explain below, these two tests vary between the circuits not only with respect to their *content* but more significantly with respect to their *position* in the overall infringement standard.

B. PROBATIVE SIMILARITY VERSUS THE OBJECTIVE TEST

The Second Circuit’s analytical test—“probative similarity”—is directed solely at identifying discrete similarities that are probative

³⁰ *Infra* p. 318.

³¹ *Infra* p. 320.

³² See *supra* notes 7-8 (discussing the *Arnstein* test).

³³ *Infra* p. 318.

³⁴ See *supra* notes 22-24 and accompanying text (discussing the *Apple Computer* test).

³⁵ *Infra* p. 320.

of derivation. Here, there is no need that such similarities be “substantial,” nor that they relate to protectable material. Probative similarity is used, along with the access requirement to answer the question: “Is the accused text *derived from the plaintiff’s*?”³⁶

In contrast, the Ninth Circuit’s analytical test—the “objective test”—is one half of that Circuit’s substantial similarity determination.³⁷ There, the combined objective of these two tests is to identify unlawful copying, that is, copying protectable material, which implicitly subsumes a derivation requirement. Thus, “derivation” is not at issue—indeed, it is never explicitly determined in the Ninth Circuit’s test but is embedded within the overall unlawful copying determination. Also, the Ninth Circuit’s objective test differs from the Second Circuit’s probative similarity requirement in that the former is apparently directed in part to determining copyrightability of *each* element that appears in both texts. In contrast, the Second Circuit’s probative similarity determination is focused solely upon identifying whether the accused text is derived from the plaintiff’s; copyrightability is virtually irrelevant.

C. SUBSTANTIAL SIMILARITY VERSUS THE SUBJECTIVE TEST

The Second and Ninth Circuits are also both comprised of an audience-impression test. As evidenced by Figure -A,³⁸ the Second Circuit’s audience test is the sole vanguard that distinguishes mere derivation from copyright infringement. Therefore, this prong must perform two tasks: one, it must separate the protectable and unprotectable elements, though only nominally; next, considering only those protectable elements common to both texts, it must determine whether the two are—according to the casual observer—“substantially similar.” In contrast, the Ninth Circuit’s audience test (or subjective test) has become almost vestigial, since the objective test, discussed in the previous section, has been expanded after *Sid & Marty Krofft Television Products*,

³⁶ See Figure -A-, *infra* p. 318.

³⁷ Figure -C-, *infra* p. 320.

³⁸ See *infra* p. 318.

*Inc. v. McDonald's Corp.*³⁹ to include an analysis of both protectable as well as unprotectable material. Thus, the Ninth Circuit's audience test does not separate protectable from unprotectable material (that was done in the objective test) as the Second Circuit's audience test does. Moreover, just like the analytical test, perhaps the most significant difference between the audience tests in the two circuits is their *position* in their respective standards. In each circuit, the audience test is performed last; however, by the time Ninth Circuit courts perform the audience test, they have already determined which of the common elements qualify for copyright protection. In contrast, this analysis is left for the Second Circuit courts to perform *during*, or within the audience test.

D. THE SIGNIFICANCE OF THE DIFFERENCES BETWEEN THE TWO STANDARDS

So why bother to separate the "unlawful copying" requirement into two parts, mere derivation *and* improper appropriation, as the Second Circuit has done? This question is worth answering because the Ninth Circuit's standard includes no such separation. Since the separation adds nothing—again, both tests have the same four requirements—it can, at most, confer only a procedural advantage.

Despite any similarity, there are only two ways that the accused text may not infringe, that is, that it may not have "copied unlawfully." First, the infringer may not have *derived* his text from the plaintiff's—that is, the similarity may be due to coincidence, or more likely, to the fact that both authors derived their texts from a common third-party text. Second, even if the accused infringer did prepare his text from the plaintiff's, that is, he copied from the text—he is only an infringer if what he took was eligible for copyright protection. If the accused infringer borrowed only uncopyrightable elements, for example, elements not original or not sufficiently concrete to qualify as protectable expression, he is not an infringer no matter how much material he copied. Thus, derivation alone does not determine infringement. At the same

³⁹ 562 F.2d 1157 (9th Cir. 1977).

time, if the accused infringer borrowed copyrightable elements from the plaintiff's text, then by definition, he derived his text from the plaintiff's; hence, there is no need, in theory at least, to *separately* determine derivation. Indeed, dividing the "unlawful copying" inquiry into derivation and improper appropriation—as the Second Circuit has done—is really just a procedural short-cut, similar to the scientist who classifies a microorganism by *first* performing an assay to determine whether it is a bacteria or a fungi. Although her ultimate classification must be far more nuanced, by performing this single preliminary test, she can quite often eliminate the need for an extensive battery of tests. Hence, the piecemeal analysis is not just a heuristic device but a time-saving one as well. Moreover, truncating the analysis, on average, reduces the error rate.

And so it is with the Second Circuit's separation of the unlawful copying requirement into two prongs: derivation (my term) and unlawful appropriation. The procedural advantage is the simplest way to justify the division: if the accused text is not derived from the plaintiff's text, then he is not an infringer, regardless of the degree of similarity between the two texts, and more importantly, regardless of whether the material in common qualifies for copyright protection. Consider how much simpler this derivation inquiry is than the subsequent inquiry, or an inquiry blending the two, which the Ninth Circuit requires. In the Second Circuit, to prove derivation, the plaintiff proffers a list of a few discrete similarities, either protectable or not, it doesn't matter, between the two texts, from which, along with proof of access, or the opportunity to view the plaintiff's text, the fact finder can infer derivation. These proffered similarities may be slight indeed—for example, that the accused city map contains a misspelled street name also found on the plaintiff's map, but not found on the actual street sign, nor anywhere else. But like this example, it can nevertheless be highly probative of derivation, which can make this inquiry unusually facile in the sense that it is unusually objective and quickly performed.⁴⁰ Most importantly, the emphasis in the

⁴⁰ See *Cooling Sys. and Flexibles, Inc. v. Stuart Radiator, Inc.*, 777 F.2d 485, 492, 228 U.S.P.Q. (BNA) 275, 281 (9th Cir. 1985) ("[C]ourts have regarded the existence of common errors in two similar works as the strongest evidence of piracy, but proof of common errors

derivation inquiry inevitably converges to the *source* of the proffered similarity. Thus, if the accused infringer could show that an old map in the public domain also contains the misspelled street name, then the probative value of that evidence vanishes. Identifying that public domain map may not be easy—which is certainly not the fact finder's problem—but if it is proffered by the accused infringer, then the fact finder's job is straightforward. Notice also that the derivation inquiry will never drift towards protectability, which is a far more difficult inquiry, and furthermore, whether the particular element proffered by the plaintiff to prove derivation qualifies for copyright is irrelevant. Indeed, often the most probative evidence of derivation is unprotectable subject matter, as evidenced by the map example. One way to view the Second Circuit's infringement test is that it is structured so that it avoids, as much as possible, the virtually intractable determination of protectability.⁴¹ Thus, in the Second Circuit, before the two texts are handed to the ordinary observer for a final verdict on infringement, we know that at least one element in the plaintiff's text is copyrightable (a presumption triggered by proffering the copyright registration), and that the accused text was derived from the plaintiff's text. Granted, these facts, coupled with the ordinary observer's impression, do not guarantee that the accused infringer copied *protectable expression*, they just make it much more likely. Thus, these three elements taken together are a proxy, though a coarse one, for the generally tedious and *ad hoc* task of determining whether the elements common to the two texts qualify for copyright protection.

Now contrast the derivation requirement with the “improper appropriation” prong. (Again, the former is subsumed within the latter, which is explicit in the Second Circuit's test, and implicit/invisible in the Ninth Circuit's test). There, the emphasis is less on the source of the proffered similarity, and more on whether it

does not obviate the need for proving substantial similarity.” (quoting NIMMER § 13.03[C] at 13-44).

⁴¹ See, Douglas Y'Barbo, *The Heart of the Matter: The Property Right Conferred by Copyright*, 49 MERCER L. REV. 643, 643-44 (1998) (arguing that a “copyright” is not an enforceable property right in relation to a particular work of authorship or the expression embodied in it, [but rather] that it is a far more qualified property right in relation to a legally structured market position”).

qualifies for copyright protection. Granted, one way that something can be *uncopyrightable* is if it is not original (hence the derivation and improper appropriation inquiries overlap). But more often than not, the focus of the protectability inquiry is whether the particular element qualifies as protectable expression according to the “idea/expression dichotomy,” which is beyond question a very time-consuming and highly subjective (and therefore error-prone) inquiry.⁴² And so the Second Circuit’s test places this determination temporarily to one side—to the extent that the court performs it all—avoiding the test until it is absolutely necessary. By contrast, the protectability determination is the undisputed center of gravity of the Ninth Circuit’s test.

Therefore, it is clear that the Second Circuit and the Ninth Circuit use very different legal standards to determine copyright infringement. What is interesting is how the approaches of the two Circuits became so different.

E. THE ORIGIN OF THE DIFFERENCE BETWEEN THE SECOND AND NINTH CIRCUITS’ STANDARDS

1. *The Krofft Standard.* At one time, the Second Circuit and the Ninth Circuits applied the same legal standard—both derived from *Arnstein*.⁴³ The two standards diverged in the 1977 decision of *Sid & Marty Krofft Television Products, Inc. v. McDonald’s Corp.*,⁴⁴ an *a priori* overhaul of the then-current standard.⁴⁵ The *Krofft* test is shown schematically in Figure -D,⁴⁶ so that it can be compared with the *Arnstein* test, depicted in Figure -B,⁴⁷ and the current Ninth Circuit standard as shown in Figure -C.⁴⁸

⁴² See, e.g., *Reyher v. Children’s Television Workshop*, 533 F.2d 87, 91, 190 U.S.P.Q. (BNA) 387, 390 (2d Cir. 1976) (“The difficult task in an infringement action is to distill the nonprotected idea from protected expression.”).

⁴³ See *supra* notes 7-8 and accompanying text (discussing the *Arnstein* test).

⁴⁴ 562 F.2d 1157, 1162, 196 U.S.P.Q. (BNA) 97, 102 (9th Cir. 1977).

⁴⁵ See, e.g., *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1398, 42 U.S.P.Q.2d (BNA) 1184, 1187 (9th Cir. 1997) (“this court’s two-part test for substantial similarity finds its roots in *Sid & Marty Krofft*. . .”).

⁴⁶ *Infra* p. 321.

⁴⁷ *Infra* p. 319.

⁴⁸ *Infra* p. 320.

As evidenced by Figure -C-, the *Krofft* court divided the substantial inquiry into two components: an “extrinsic” test and an “intrinsic” test.⁴⁹ Prior to *Krofft* the substantial inquiry test consisted of a single element, similar to the Second Circuit’s test in Figure -B-. To summarize, the *Krofft* court split the substantial similarity test as a result of a deficiency perceived by the court in the then-current test. More precisely, the *Krofft* court believed that the then-current substantial similarity test would condemn an accused text that copied only ideas from the plaintiff’s text, which are *per se* unprotectable. Thus, according to the *Krofft* court, a refinement was needed, to separately assess whether the accused text copied protectable expression or mere ideas.

As a result, the purpose of the extrinsic test is to determine whether substantial similarity exists with respect to *ideas*. The *Krofft* court labeled the test “extrinsic” because:

[I]t depends not upon the responses of the trier of fact, but on specific criteria which can be listed and analyzed. Such criteria include the type of artwork involved, the material used, the subject matter, and the setting for the subject. Since it is an extrinsic test, analytic dissection and expert testimony are appropriate. Moreover, this question may often be decided as a matter of law.⁵⁰

In contrast, the purpose of the intrinsic test is to determine whether the two texts are substantially similar with respect to *expression*. Unlike the extrinsic test, which is analytic, the intrinsic test is administered by the ordinary observer, who assesses similarity after a casual glance at the two texts.⁵¹

This is a peculiar reformulation of the venerable *Arnstein* standard, to say the least. It is not clear why one needs an entire test (the extrinsic test) merely to determine similarity with respect to (unprotectable) ideas. By definition, ideas can be freely copied. Therefore, that an accused infringer has copied ideas from the

⁴⁹ *Krofft*, 562 F.2d at 1164.

⁵⁰ *Id.*

⁵¹ *Id.*

plaintiff's work is irrelevant for purposes of determining infringement.⁵²

In fact, the *Krofft* standard has been harshly and consistently criticized, so there is little point in reiterating its shortcomings here.⁵³ Instead, what is of interest is *the reason* for the *Krofft* court's departure from established law and whether the departure was necessary, or even justifiable. Also of interest is the path from the *Krofft* standard to the current Ninth Circuit standard.

So why did the *Krofft* court depart from the then-current standard? According to the court's own admission, it did so to restrict the scope of a plaintiff's copyright from extending to (unprotectable) ideas. Thus it sought to construct a mechanism to separate ideas from protectable expression:

[I]nfringement would be established upon proof of ownership, access, and substantial similarity. Application of this rule, however, would produce some untenable results. For example, a copyright could be obtained over a cheaply manufactured plaster statue of a nude. Since ownership of a copyright is established, subsequent manufacturers of statues of nudes would face the grave risk of being found to be infringers if their statues were substantially similar and access were shown. The burden of proof on the plaintiff would be minimal, since most statues of nudes would in all probability be substantially similar to the cheaply manufactured plaster one.⁵⁴

Having identified the problem, the *Krofft* court noted the need for a limiting principle, so that copyright protection is not unduly

⁵² Of course, copying of *any* material is probative of derivation, though that is certainly not what the *Krofft* court had in mind.

⁵³ See, e.g., MELVILLE AND DAVID NIMMER, 4 NIMMER ON COPYRIGHT, § 13.03[D] at 13-77 & n.198.6 (1997) (acknowledging that the *Krofft* decision has much wrong with it while affirming the decision's structure of analysis).

⁵⁴ *Krofft*, 562 F.2d at 1162-63 (citations omitted).

extensive.⁵⁵ The court found this limiting principle in the “idea/expression” dichotomy:

The test for infringement therefore must be given a new dimension. There must be ownership of the copyright and access to the copyrighted work. But there must also be substantial similarity not only of the general ideas but of the expression of those ideas as well. Thus two steps in the analytical process are implied by the requirement of substantial similarity.⁵⁶

Thus, the *Krofft* court departed from the *Arnstein* test in two crucial respects: (1) it disregarded the separation of the copying (or derivation) prong from the more general requirement of unlawful copying (*Arnstein* subsumed a mechanism to release the accused infringer who can prove he did not copy from the plaintiff's text, even though the two are alike), and (2) it incorporated a two-part substantial similarity inquiry.

It is necessary to determine whether this new legal standard devised by the *Krofft* court was even necessary. The *Krofft* court began by stating that “[i]nfringement would be established upon proof of ownership, access, and substantial similarity.”⁵⁷ All that followed in the court's opinion depended on the veracity of the above statement. Unfortunately, the statement is materially incorrect. The statement above proves that the *Krofft* court misunderstood the *Arnstein* standard. Under the *Arnstein* test, one does not establish infringement by showing ownership, access, and substantial similarity; *Arnstein* said no such thing. Rather, as evidenced by Figure -A-,⁵⁸ one proves copyright infringement under *Arnstein* by showing ownership of a valid copyright, derivation from the plaintiff's text by the accused, which is proven by access plus probative similarity, and by proving “unlawful appropriation,” which is shown by “substantial similarity”. The source of

⁵⁵ *Id.*

⁵⁶ *Id.* at 1164.

⁵⁷ *Id.* at 1162.

⁵⁸ *Infra* p. 318.

the *Krofft* court's concern (and confusion) was the term "substantial similarity." This term has never included similarity with respect to unprotectable portions of the work at issue. Courts have consistently instructed the ordinary observer to disregard unprotectable subject matter.

Although the term "substantial similarity" was never used by the *Arnstein* court, the court did use the term "improper appropriation" in reference to the second prong of the infringement analysis. The first prong is copying (more precisely referred to as "derivation"). The *Arnstein* court created a legal standard for copyright infringement which first required the plaintiff to prove that the accused text was derived from a text in which the plaintiff held a valid copyright. If that requirement was met, then the plaintiff was further required to prove that the copying was "illicit," or "unlawful." As a result of the court's two-pronged approach, not all copying was actionable. The *Arnstein* court repeatedly emphasized that copying must be "illicit" in order to be actionable:

In applying that standard here, it is important to avoid confusing two separate elements essential to a plaintiff's case in such a suit: (a) that defendant copied from the plaintiff's copyrighted work and (b) that the copying (assuming it to be proved) went so far as to constitute improper appropriation.⁵⁹

If copying is established, then only does there arise the second issue, that of illicit copying (unlawful appropriation).⁶⁰

Assuming that adequate proof is made of copying, that is not enough; for there can be 'permissible copying,' copying which is not illicit.⁶¹

Therefore, the *Arnstein* court crafted a legal standard that expressly accounted for the fact that an accused infringer may have copied

⁵⁹ *Arnstein v. Porter*, 154 F.2d 464, 468, 68 U.S.P.Q. (BNA) 288, 292-93 (2d Cir. 1946).

⁶⁰ *Id.*

⁶¹ *Id.* at 472.

from the plaintiff's text—even to the point that the two appear “substantially similar”—yet the material taken may not be eligible for copyright protection. As a result, even “substantially similar” texts may not satisfy the test for finding infringement.

The *Krofft* court was concerned about protection for uncopyrightable ideas. More specifically, the Court was concerned that two texts could be “substantially similar” and that it would be unjust to condemn the copying because the material copied consisted of unprotectable ideas rather than protectable expression. Although the *Arnstein* court did not expressly mention this scenario, the *Arnstein* standard subsumes this concern by distinguishing copying from illicit copying, although one can copy without the copying rising to the level of “illicit” for reasons *other than* that the material consists of mere ideas. For instance, the borrowed material could have been borrowed by the plaintiff from a text whose copyright has long since lapsed or the material could be classified as scenes-a-faire.⁶²

Second Circuit decisions closely following *Arnstein* have even further clarified the role of the substantial similarity prong. This provides additional evidence that the *Krofft* court was fixated on a concern *already accounted for* in the Second Circuit's test:

“[S]ubstantial similarity” requires that the copying [be] quantitatively *and* qualitatively sufficient to support the legal conclusion that infringement (*actionable* copying) has occurred. The qualitative component concerns the copying of expression, rather than ideas. . . .⁶³

“It is only after actual copying is established that one claiming infringement” then proceeds to demonstrate that the copying was improper or unlawful by show-

⁶² For a more complete discussion of the categories of material that comprise the public domain, see Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990) (discussing the importance of a public domain to the otherwise unworkable copyright system).

⁶³ *Castle Rock Entertainment, Inc. v. Carol Publ'g Group Inc.*, 150 F.3d 132, 138, 47 U.S.P.Q.2d (BNA) 1321, 1324 (2d Cir. 1998).

ing that the second work bears “substantial similarity” to protected expression in the earlier work.⁶⁴

[Copying] is usually proved by . . . substantial similarities as to *protectible material* in the two works.⁶⁵

It is doubtless that the *Krofft* standard was based on a flawed premise: that the existing standard would condemn texts which incorporated from the plaintiff's text only unprotectable ideas. Notably, however, the *Arnstein* test had already subsumed a reliable mechanism to ensure that outcome would not occur.

2. *The Role of Second Circuit Law in the Krofft Standard.* One must keep in mind that *Krofft* purports to follow *Arnstein*: “We believe that the court in *Arnstein* was alluding to the idea-expression dichotomy [by distinguishing copying from illicit copying] which we make explicit today.”⁶⁶ And later: “We believe *Arnstein* is still good law.”⁶⁷ This is surprising since one would never expect *Krofft* to be faithful prodigy of *Arnstein* after a close look at the *Krofft* standard. Therefore, it is not difficult to prove that *Krofft* is based upon a misreading of *Arnstein*.⁶⁸ The *Krofft* court apparently believed that the existing standard overprotected original material because it subsumed no mechanism to distinguish mere unprotectable ideas from protectable expression.⁶⁹ The interesting question is precisely what led to the obvious error by the *Krofft* court.

While *Arnstein* is the undisputed ancestor of the infringement standard applied in every regional circuit, it nevertheless intro-

⁶⁴ *Id.* at 137 (citing *Repp v. Webber*, 132 F.3d 882, 889, 47 U.S.P.Q.2d (BNA) 1285, 1291 (2d Cir. 1997) and *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 139-40, 22 U.S.P.Q.2d (BNA) 1811, 1819 (2d Cir. 1992)).

⁶⁵ *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90, 190 U.S.P.Q. (BNA) 387, 390 (2d Cir. 1976) (citing *Arnstein v. Porter*, 154 F.2d 464, 468, 68 U.S.P.Q. (BNA) 288, 293 (2d Cir. 1996)).

⁶⁶ *Sid & Marty Krofft Television Prod., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1165, 196 U.S.P.Q. (BNA) 97, 103 (9th Cir. 1977).

⁶⁷ *Id.*

⁶⁸ Actually, *Krofft* cites Second Circuit precedent decided after *Arnstein*, in particular, *Reyher*, 533 F.2d at 90.

⁶⁹ *Krofft*, 562 F.2d at 1164-65.

duced two slight but insidious flaws into the standard which later metastasized into chronic confusion over how to apply the standard. Yet one must be careful to note that while *Arnstein* introduced these flaws, it did not itself contain them. Indeed, the flaws relate solely to nomenclature—the particular labels affixed to the prongs comprising the test. The *Arnstein* court knew what it meant. As we shall see, other courts have been less sure.

Refer again to Figure -B-.⁷⁰ In its most general form, copyright infringement is proved by copying and ownership of a valid copyright. As evidenced by Figure -A-,⁷¹ which depicts the *Arnstein* test, this second requirement in turn has two prongs, copying and improper appropriation. For the latter requirement, *Arnstein* used the term “illicit copying.” Therefore, *Arnstein* included the term “copying” three different times in one legal standard. In each of these occurrences, “copying” meant different things.⁷² This casual usage of the already vague term “copying” has directly caused chronic, material confusion over the proper infringement standard, confusion that persists today. Such casual usage has also led to a different standard used in the Ninth Circuit, a standard which originally deviated from *Arnstein* because of a misunderstanding over *Arnstein*'s multiple uses of the term “copying.”

Thus *Arnstein* said that “[i]f there is evidence of access and similarities exist, then the trier of the facts must determine whether the similarities are sufficient to prove copying.”⁷³ In that instance the court was referring to what I have relabeled as the *derivation* prong in Figure -E-⁷⁴ and the upper most appearance of the term “copying” in Figure -A-.⁷⁵ Significantly, many courts after *Arnstein* confused the term “copying” as *Arnstein* used it above, with “unauthorized copying,” the leftmost appearance of the

⁷⁰ *Infra* p. 319.

⁷¹ *Infra* p. 318.

⁷² Actually, *Arnstein* never stated the infringement test in its most abstract form (ownership plus unlawful copying). Rather, *Arnstein* focused only on the second prong's two requirements, copying and illicit copying/improper appropriation, without referring to the name of the second prong itself. *Arnstein* used the terms “illicit copying” and “improper appropriation” interchangeably. *Arnstein*, 154 F.2d at 464.

⁷³ *Id.* at 468.

⁷⁴ Figure -E-, *infra* p. 322.

⁷⁵ Figure -A-, *infra* p. 318.

term “copying” in Figure -A-.⁷⁶ In other words, while *Arnstein* was speaking about mere derivation, other courts believed it was talking about the *entire* “unauthorized copying” inquiry, of which derivation is only a part.

Most relevant here, the *Reyher* court, in an influential 1976 Second Circuit decision, with the intention of applying the *Arnstein* standard, said that “[copying is] proved by circumstantial evidence of access to the copyrighted work and substantial similarities as to protectible material in the two works.”⁷⁷ One can compare this excerpt with the one from *Arnstein* above and see that they are roughly the same: copying is shown by access plus similarity. However, in *Arnstein* the court was referring to the *derivation* prong. The *Reyher* court misread *Arnstein*, and believed that it was referring to the “unlawful copying” prong.⁷⁸ In other words, while the *Arnstein* court was reciting just a portion of the test (the other part being “unlawful appropriation,” in Figure -A-) the *Reyher* court thought that the *Arnstein* court was reciting the *entire* test. This misinterpretation was due solely to the multiple occurrences of the term “copying” in the standard and led the *Reyher* court to effectively sever from the standard *Arnstein*’s “unlawful appropriation,” or “illicit copying,” prong. Indeed, *Krofft* is perhaps best understood as an attempt to reintroduce that element back into the standard, which the *Krofft* court understandably believed was missing.

So the *Reyher* court restated the *Arnstein* test with two effects. First, the *Reyher* court believed it was reciting the entire test, thus

⁷⁶ *Infra* p. 318.

⁷⁷ *Reyher v. Children’s Television Workshop*, 533 F.2d 87, 90, 190 U.S.P.Q. (BNA) 387, 390 (2d Cir. 1976).

⁷⁸ Figure -A-, *infra* p. 318. How can we be sure that the *Reyher* court misread *Arnstein*? First, we can simply compare the two legal standards, noting that the *Reyher* court faithfully cites *Arnstein* at critical points in the opinion. Second, *Reyher* begins by stating the infringement test in its most fundamental form: infringement requires ownership and “copying.” *Id.* Next, *Reyher* states that “copying” is proved by access and “substantial similarities as to protectable material in the two works.” *Id.* Therefore, beyond question, *Reyher*, had in mind the broad meaning of the term “copying,” labeled as “unauthorized copying” in Figure -A-, and not the narrower use of the term copying applied by the *Arnstein* Court, labeled as “derivation” in Figure -B-. Again, the *Arnstein* court said that copying, meaning “derivation”, was proved by access plus similarity probative of copying. Once plaintiff established this “factual type of copying,” he must prove that the copying is legally actionable, which is done by proving that some of the purloined material qualifies for copyright.

completely omitting the “improper appropriation prong” from the “revised” test that it decreed. Second, precisely *because* the *Reyher* court believed it was reciting the entire test, it slightly reworked the first portion of the *Arnstein* test. Thus, paraphrasing the two passages above, the *Arnstein* court said that copying, that is, derivation, is proved by access plus similarity probative of derivation. Yet the *Reyher* court said that copying, meaning unlawful copying, is proved by access plus “substantial similarities as to protectable material. . . .”⁷⁹ Thus the term “substantial similarity” was introduced into the infringement test.

The *Reyher* court then required access plus “substantial similarity.” But the *Arnstein* standard for derivation requires only similarity *that is probative of copying*; this similarity need not be “substantial,” that is, it need not be pervasive, nor must it relate to protectable material. Subsequent courts, attempting to reconcile the *Arnstein* and *Reyher* standards, introduced a *dual usage* of the term “substantial similarity,” so that it referred to both similarities probative of derivation and to similarities probative of unlawful appropriation.

Reyher's misreading of *Arnstein* is significant because it was *Reyher* that *Krofft* followed, hence *Reyher's* obvious misreading of *Arnstein* was instantly infused into Ninth Circuit law.

3. *From Krofft to the Present Ninth Circuit Standard.* By comparing the *Krofft* standard, depicted in Figure -D-,⁸⁰ with the current Ninth Circuit standard, depicted in Figure -C-,⁸¹ one can see that it has changed very little. Indeed, its essential structure has not changed at all. Aside from re-labeling the two prongs of the “substantial similarity” test by swapping “extrinsic” and “intrinsic” for “objective” and “subjective”, the only observable change has been to the extrinsic test. The post-*Krofft* modifications shall be discussed below.

From its inception, the extrinsic test, to determine similarity of unprotectable ideas, had little to justify it. Yet, since the test permitted analytical dissection, courts gradually began to use it to *separate* ideas from protectable expression. In effect, courts used

⁷⁹ *Id.*

⁸⁰ *Infra* p. 321.

⁸¹ *Infra* p. 320.

the extrinsic test to determine the scope of the copyright claim, since once the court reached the intrinsic test, it could no longer scrutinize individual elements but would be forced to rely upon the subjective impressions of the casual observer, who would inevitably ignore the crucial distinction between protectable and unprotectable expression. Also, once the ideas were separated from protectable expression, the court could proceed to the intrinsic test, examining the two texts only in light of the similarities that related to protectable expression. Thus, the inevitable metamorphosis, the expansion of the extrinsic test, occurred.

Again, the major difference between the *Krofft* standard and the one used today is not a structural one, but a slight change in nomenclature, from extrinsic/intrinsic to objective/subjective. Though the terms "objective" and "subjective" had appeared in Ninth Circuit opinions earlier,⁸² *Shaw v. Lindheim*,⁸³ a 1990 decision, is generally cited as the genesis of the reformulation:

Now that it includes virtually every element that may be considered concrete in a literary work, the extrinsic test . . . can no longer be seen as a test for mere similarity of ideas. Because the criteria incorporated into the extrinsic test encompass all objective manifestations of creativity, the two tests are more sensibly described as objective and subjective analyses of *expression*, having strayed from *Krofft's* division between expression [intrinsic test] and ideas [extrinsic test].⁸⁴

More recently, the Ninth Circuit commented on the scope of the extrinsic test in *Apple Computer, Inc.*: "[T]he extrinsic test now objectively considers whether there are substantial similarities in

⁸² At least as early as 1984, seven years after *Krofft*, Ninth Circuit panels began to expand the extrinsic test to include the entire text, and to separate protectable from unprotectable material. *Litchfield v. Spielberg*, 736 F.2d 1352, 1356, 222 U.S.P.Q. (BNA) 965, 967 (9th Cir. 1984). See also, e.g., *Data East USA, Inc. v. Epyx, Inc.*, 862 F.2d 204, 208, 9 U.S.P.Q.2d (BNA) 1322, 1325 (9th Cir. 1988) ("[the extrinsic test is] an objective test which rests upon specific criteria that can be listed and analyzed.").

⁸³ 919 F.2d 1353 (9th Cir. 1990).

⁸⁴ *Shaw*, 919 F.2d at 1357 (emphasis added).

both ideas and expression, whereas the intrinsic test continues to measure expression subjectively.”⁸⁵

Moreover, probably by *Brown Bag Software*, and at least by *Apple Computer, Inc.*, the extrinsic test has evolved into a full-blown analysis of the boundaries of the plaintiff's property right, that is, which elements borrowed by the accused infringer are protectable and which are not: “the purpose of analytic dissection is to define scope of copyright protection.”⁸⁶ Hence, the extrinsic/objective test has expanded at the expense of the now almost atavistic intrinsic/subjective test.

V. AN INTERIM SUMMARY AND A PROPOSED RELABELED TEST FOR INFRINGEMENT

To summarize, these are the indisputable facts: (1) the current tests for copyright infringement applied in the Ninth Circuit (*Apple Computer*) and in the Second Circuit (*Castle Rock*) are not the same; (2) this difference is material; (3) both tests claim to be faithful progeny of *Arnstein*; (4) the current Ninth Circuit test originated with *Krofft*, which claims to follow *Arnstein*; (5) *Krofft* is based on a substantial, though inadvertent misreading of *Arnstein*; and therefore (6) the current Ninth Circuit test is ultimately based on a misreading of *Arnstein*.

The preceding discussion should convince the reader that the confusion over the copyright infringement standard is more likely than not due to the multiple usage of the same terms to describe different legal requirements. Indeed, not only are two key terms used multiple times in a single legal standard, but the two terms are themselves vague—“substantial similarity” and “copying.”

One source of the confusion has been largely cured, at least in the Second Circuit. Thus the “substantial similarity” requirement that once appeared in the derivation portion of the test has been replaced with “probative similarity” so that it cannot be confused with the “substantial similarity” requirement in the second prong

⁸⁵ *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442, 32 U.S.P.Q.2d (BNA) 1086, 1091 (9th Cir. 1994) (emphasis added) (citing *inter alia*, *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1475, 22 U.S.P.Q.2d (BNA) 1429, 1437 (9th Cir. 1992)).

⁸⁶ *Apple Computer*, 35 F.3d at 1443 (citing, *inter alia*, *Brown Bag Software*, 960 F.2d at 1475).

of the test, which means illicit copying or improper appropriation.⁸⁷ Still, the term “copying” appears too many times in the infringement test. The most abstract formulation of the test is: ownership of a valid copyright and copying. The latter requirement subsumes two requirements: mere copying and illicit copying. That is *three* occurrences of the term “copying.” To avoid confusion and to better clarify the objectives of the test, the term “derivation” should be used to refer to the requirement that the accused text was prepared from the plaintiff’s text. This requirement, which does not appear separately in the Ninth Circuit test, is not *distinct from* illicit copying; actually, derivation is subsumed within illicit copying. Thus, a text can be derived from another, yet still not be an “illicit” copy of the first text if, for example, the borrowed material was not protectable by copyright. The next prong, whether the derivation amounts to unlawful copying, should be referred to as “unlawful appropriation.” This is not a new term—it was used in *Arnstein*⁸⁸ (though interchangeably with the term “illicit copying”), and it is used occasionally in Second Circuit decisions today.⁸⁹ In addition, the first time the term is used, that is, to refer to the most abstract form of the test, it should be replaced with “actionable copying,” which captures the two requirements that it subsumes: derivation and unlawful appropriation. Figure -E- illustrates this suggested nomenclature.⁹⁰

Besides nomenclature, another reason for the persistent confusion over the infringement standard is that the two prongs subsumed under the actionable copying requirement are not actually *separate* requirements, but rather one is actually a part of the other, that is, derivation is part of the unlawful appropriation prong. In other words, if the accused text includes copyrightable expression from the plaintiff’s text, then derivation is implicitly proved, since if the material was copyrightable, then it is by definition original to the plaintiff (he is the author) and, therefore, the only source of it is the plaintiff’s text. Thus, one inherently

⁸⁷ Alan Latman, “Probative Similarity” as Proof of Copying: *Toward Dispelling Some Myths in Copyright Infringement*, 90 COLUM. L. REV. 1187, 1190 (1990).

⁸⁸ *Arnstein v. Porter*, 154 F.2d 464, 468, 68 U.S.P.Q. (BNA) 288, 293 (2d Cir. 1946).

⁸⁹ *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 140, 22 U.S.P.Q.2d (BNA) 1811, 1819 (2d Cir. 1992).

⁹⁰ *Infra* p. 322.

proves derivation by proving unlawful appropriation. The significance of this is that one could avoid the derivation prong altogether and instead proceed to the second prong, unlawful appropriation. Indeed, this is why the *Arnstein* test (Second Circuit) and the *Apple Computer* test (Ninth Circuit) are, in the end, more or less the same, as we have seen. *Arnstein* insists upon extracting from the infringement test the predicate sub-requirement of derivation, no doubt as a way of avoiding both the arbitrary and labor-intensive unlawful appropriation analysis to assess substantial similarity under the ordinary observer in those inevitably frequent instances in which it is not needed. In contrast, the Ninth Circuit test *blends* the two inquiries of derivation and unlawful appropriation.

In theory at least, the Ninth Circuit's test should converge on the same result as the Second Circuit's test, even without an explicit predicate derivation requirement. This is because under the substantial similarity test, an accused text that does not embody any protectable expression found in the plaintiff's text will be released. Under the Second Circuit's test, it might very well have been determined that the accused text was derived from the plaintiff's, for example, it was proved by *unprotectable* material common to the two texts, though it would *later* be determined during the unlawful appropriation prong that what was taken did not qualify for copyright protection, and hence there was no infringement. The Ninth Circuit would have reached the same result, though without having bothered to first determine that the accused text was derived from the plaintiff's.

But what about the opposite scenario? Suppose the accused text was not derived from the plaintiff's, but they are highly similar. The Second Circuit test would detect that right away, and stop right there, avoiding the unlawful appropriation requirement. The Ninth Circuit would, in theory, reach the same result, but it would take longer, which always increases the potential for error. Without a mechanism to detect derivation, or the absence thereof, then a Ninth Circuit tribunal must plod through the substantial similarity test, both the objective and subjective prongs. After doing that, the court would (again, in theory) conclude that the accused text does not infringe, though *not* because it was not derived from the plaintiff's text (it has no way to discern that), but because it does not embody protectable expression from the

plaintiff's text. As previously mentioned, it is much easier to argue over the *source* of the similarities, than it is to argue over whether elements in the plaintiff's text (for which there exists a similar element in the accused text) qualify for copyright protection. The practical significance of this distinction cannot be overstated.

Perhaps these differences alone are reason enough to favor the Second Circuit test over the Ninth Circuit test, aside from the fact that the Ninth Circuit test is derived from a 50-year-old inadvertent misreading of a Second Circuit decision. Thus, the Second Circuit has a far more summary judgment-friendly standard since it allows accused infringers, particularly in those instances involving two highly similar texts in which the plaintiff's is characterized by low originality, to walk away from the dispute once they can show that they did not derive their text from the plaintiff's. Yet in the Ninth Circuit, which again should yield the same result, the accused infringer must suffer through the substantial similarity analysis, or at least the objective portion of it anyway, since the plaintiff's *prima facie* case does not include proof of derivation *apart from* the requirement to prove similarity with respect to protectable elements. Therefore, splitting the actionable copying prong into two separate requirements is not only sensible but procedurally (and heuristically) useful. It allows the fact finder to stop and assess derivation separate from the far more tedious and complicated task of determining whether what was borrowed qualifies for protection by copyright. It is also procedurally superior since it allows the court to truncate the dispute if the plaintiff is unable to prove derivation, and thus avoids becoming mired in the next part of the test.

VI. THE REMAINING REGIONAL CIRCUITS

In the first portion of this Article, I sought to show that a genuine difference exists between two standards for copyright infringement. Having shown that it is significant, I shall now argue that the distinction is underappreciated—indeed, virtually ignored—among the Courts of Appeals.

According to my research, the Courts of Appeals are roughly split between the two polar standards decreed by the Second and Ninth Circuits. Of the nine remaining regional circuits, four follow the

Second Circuit and five have adopted the Ninth Circuit approach. This division roughly follows geography: The First,⁹¹ Fifth,⁹² Tenth,⁹³ and Eleventh⁹⁴ Circuits follow the Second Circuit approach, while the Third,⁹⁵ Fourth,⁹⁶ Sixth,⁹⁷ Seventh,⁹⁸ and

⁹¹ *CMM Cable Rep., Inc. v. Ocean Coast Properties, Inc.*, 97 F.3d 1504, 1513, 41 U.S.P.Q.2d (BNA) 1065, 1072 (1st Cir. 1996) (“To show actionable copying and therefore satisfy *Feist’s* second prong, ‘a plaintiff must first prove that the alleged infringer copied plaintiff’s copyrighted work as a factual matter; to do this he or she may either present direct evidence of factual copying or, if that is unavailable, evidence that the alleged infringer had access to the copyrighted work and that the offending and copyrighted works are so similar that the court may infer that there was factual copying (i.e., probative similarity.)’ Next, a plaintiff must ‘prove that the copying of copyrighted material was so extensive that it rendered the offending and copyrighted works substantially similar.’”) (citations omitted).

⁹² *Engineering Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1340-41, 31 U.S.P.Q.2d (BNA) 1641, 1644 (5th Cir. 1994) (“Two separate components underlie proof of actionable copying. First is the factual question whether the alleged infringer actually used the copyrighted material to create his own work. Copying as a factual matter typically may be inferred from proof of access to the copyrighted work and ‘probative similarity.’ Not all copying, however, is copyright infringement. The second and usually more difficult question is whether the copying is legally actionable. This requires a court to determine whether there is substantial similarity between the two works.”) (citations omitted) (citing, *inter alia*, *Plains Cotton Coop. Ass’n v. Goodpasture Computer Serv., Inc.*, 807 F.2d 1256, 1 U.S.P.Q.2d (BNA) 1635 (5th Cir. 1987)).

⁹³ *Country Kids ‘N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1284, 38 U.S.P.Q.2d (BNA) 1017, 1019 (10th Cir. 1996) (“Plaintiff can indirectly prove copying by establishing that Defendants had access to the copyrighted work and that there are probative similarities. [Copying, however, does] not end the court’s inquiry, as liability for copyright infringement will attach only where protected elements . . . are copied. To impose such liability, the court must find substantial similarity between those aspects of Plaintiff’s dolls which are legally protectable and the Defendant’s dolls.”) (citations omitted).

⁹⁴ *MiTek Holdings, Inc. v. Arce Engineering Co.*, 89 F.3d 1548, 1554, 39 U.S.P.Q.2d (BNA) 1609, 1613 (11th Cir. 1996) (“[P]roof of copying may be shown either by direct evidence, or, in the absence of direct evidence, it may be inferred from indirect evidence demonstrating that the defendant had access to the copyrighted work and that there are probative similarities between the alleged infringing work and the copyrighted work.”) (citations omitted).

⁹⁵ *Ford Motor Co. v. Summit Motor Prods., Inc.*, 930 F.2d 277, 291, 18 U.S.P.Q.2d (BNA) 1417, 1428 (3d Cir. 1991) (“[copying is] proven by ‘showing that the defendant had access to the allegedly infringed work, . . . that the allegedly infringing work is substantially similar to the copyrighted work.’”) (citing *Whelan Assocs., Inc. v. Jaslow Dental Labs., Inc.*, 797 F.2d 1222, 230 U.S.P.Q. (BNA) 481 (3d Cir. 1986)).

⁹⁶ *Towler v. Sayles*, 76 F.3d 579, 582, 37 U.S.P.Q.2d (BNA) 1785, 1786 (4th Cir. 1996) (“*Towler* [the plaintiff] can raise a presumption of copying by showing both that *Sayles* had access to ‘Crossed Wires’ [the work involved in the suit] and that the two screenplays in question are substantially similar.”) (citing *Dawson v. Hinshaw Music Inc.*, 905 F.2d 731, 732, 15 U.S.P.Q.2d (BNA) 1132, 1133 (4th Cir. 1990)). Additionally: “there are two prongs to the substantial similarity inquiry . . . an ‘extrinsic’ or ‘objective’ inquiry . . . [and an] ‘intrinsic’ or ‘subjective’ test.” *Dawson*, 905 F.2d at 732-33.

Eighth⁹⁹ Circuits follow the Ninth Circuit approach. More importantly though, this list is a little less than precise, since a few of the circuits have occasionally blended the two approaches in a single opinion, or switched back and forth between the two from one opinion to the next. This suggests that the circuits generally regard any disparity between the Second and Ninth Circuits' infringement standards as a mere difference in nomenclature, rather than as a genuine difference that may lead to a difference in outcome. Again, one objective of this Article is to urge the significance of the difference between the two circuits' tests for infringement.

For instance, the term "probative similarity" appears infrequently in Ninth Circuit opinions and in opinions from courts that ostensibly follow the Ninth Circuit approach. Again, the term "probative similarity" is properly used to distinguish evidence that tends to prove *derivation* versus evidence that tends to prove legally actionable copying (infringement); the latter is referred to in Second Circuit vernacular as "substantial similarity." Beyond question—and as discussed in this Article—the Ninth Circuit eschews this distinction. Yet, a recent Ninth Circuit decision, *Fodor v. Time*

⁹⁷ *Marigold Foods, Inc. v. Purity Dairies, Inc.*, Nos. 91-5593, 91-5668, 1992 WL 127017, at *2 (6th Cir. June 10, 1992) ("When direct evidence of copying is unavailable, evidence of the alleged infringer's access to the underlying work and a substantial similarity between the alleged copy and the original are 'in themselves sufficient to create an inference of copying and to establish a prima facie case of copying.'") (citation omitted). *See also*, *Baxter v. MCA, Inc.*, 812 F.2d 421, 423, 2 U.S.P.Q.2d (BNA) 1059, 1061 (9th Cir. 1987) ("Absent evidence of access, a 'striking similarity' between the works may give rise to a permissible inference of copying.") (citations omitted).

⁹⁸ *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 508-09, 30 U.S.P.Q.2d (BNA) 1140, 1143-44 (7th Cir. 1994) ("[C]opyright infringement may be inferred when it is shown that 'the defendant had access to the copyrighted work, and the accused work is substantially similar to the copyrighted work' . . . '[S]ubstantial similarity is made by the 'ordinary observer test.'") (citations omitted).

⁹⁹ *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117, 120, 4 U.S.P.Q.2d (BNA) 1864, 1865-66 (Fed. Cir. 1991) ("To establish her claim for copyright infringement in the absence of direct evidence of copying, Hartman had to prove: (1) her ownership of the copyright . . . ; (2) access . . . ; and (3) substantial similarity . . .") (quoting *McCulloch v. Albert E. Prince, Inc.*, 823 F.2d 316, 318 (9th Cir. 1987)). The *Hartman* court went on to say: "[d]etermination of substantial similarity involves a two-step analysis. There must be substantial similarity 'not only of general ideas but of the expressions of those ideas as well. [F]irst, similarity of ideas is analyzed extrinsically, focusing on objective similarities . . . similarity of expression is evaluated using an intrinsic test. . . ." *Hartman*, 833 F.2d at 120 (citation omitted) (citing *McCulloch*, 823 F.2d at 316).

Warner, used the term “probative similarity,” though interchangeably with the term “substantial similarity.”¹⁰⁰ A recent district court decision in the Eighth Circuit (again, a circuit that purports to follow the Ninth Circuit’s approach) also refers to “probative similarity,” though like *Fodor*, uses it interchangeably with “substantial similarity.”¹⁰¹ And therefore, these courts do not extract from the infringement analysis a distinct derivation requirement, as a faithful reading of *Arnstein* requires.

Consider also this remark from a frequently cited Fourth Circuit decision:

Some courts use a different set of labels for the two-prong inquiry, referring to the first prong as establishment of copying and the second prong as establishment of illicit appropriation (citation omitted). The difference in labels need not concern us because the apparent consensus as to the nature of the tests applicable to each prong of the substantial similarity inquiry smooths over, as a practical matter, underlying differences in the inquiry’s two characterizations.¹⁰²

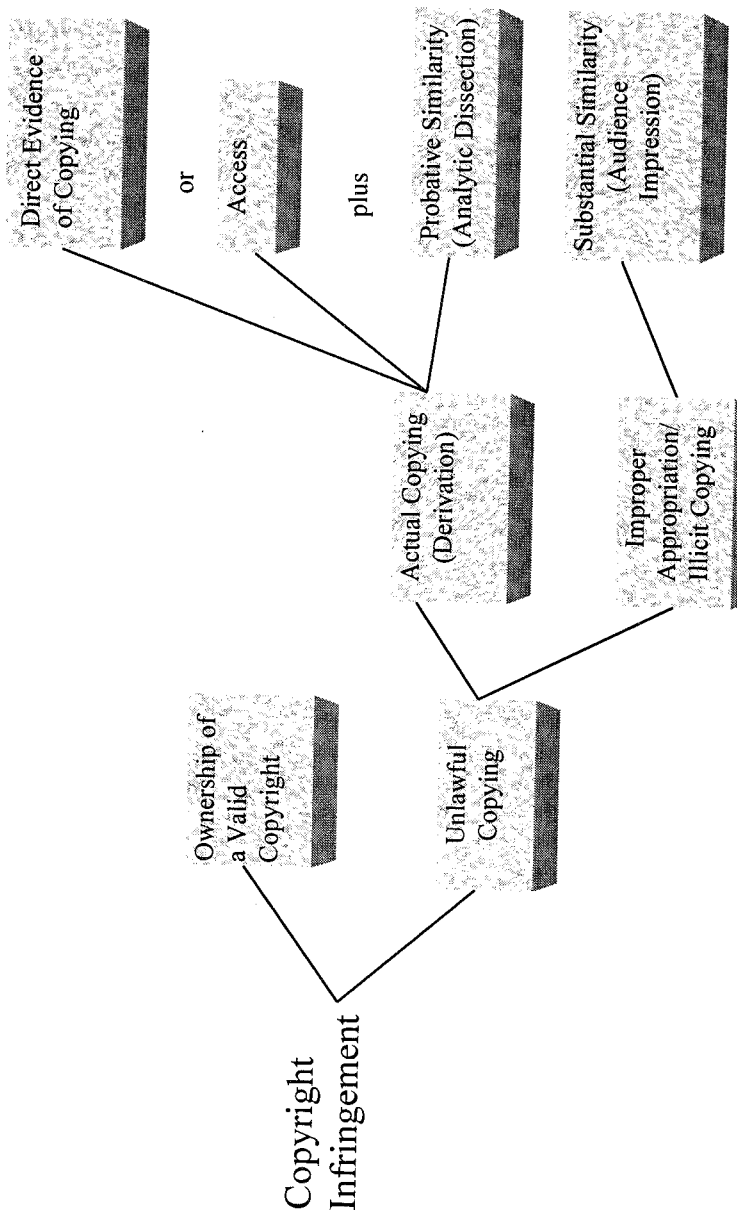
Therefore, as I have shown, though the Second and Ninth Circuit tests are genuinely different legal standards, this difference, or at least its significance, has escaped the attention of the remaining regional Courts of Appeals.

¹⁰⁰ *Fodor v. Time Warner*, Nos. 92-56169, 92-56454, 1994 WL 65287, at *2 (9th Cir. Mar. 2, 1994). This is the only Ninth Circuit decision that refers to “probative similarity.” In *Fodor*, the court cites Nimmer’s treatise for the proposition that proof of copying, which along with proof of ownership equals infringement, requires access plus probative similarity. Yet the court states in the very *next* sentence that: “Even if two works are substantially similar, however, there is no infringement liability if the challenged work was independently created.” *Id.*

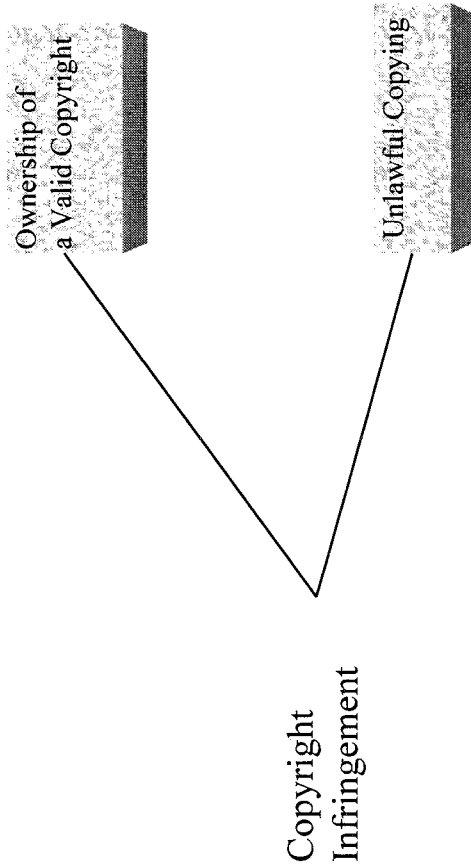
¹⁰¹ *Control Data Sys., Inc. v. Infoware, Inc.*, 903 F. Supp. 1316, 1320 (D. Minn. 1995). Consider this passage from the opinion: “The Court next considers whether there are “probative similarities” between [the two works]. Control Data asserts that the AlphaCyber source code is substantially similar to the NOS source code.” *Id.* at 1321. Just a few sentences later the court goes on to say: “[T]he Court finds that the similarities in these areas are indeed substantial and constitute probative evidence of copying.” *Id.* These passages indicate that the court has confused the two terms—beyond question, it believes the two terms are synonymous.

¹⁰² *Dawson v. Hinshaw Music Inc.*, 905 F.2d 731, 733, n.1, 15 U.S.P.Q.2d (BNA) 1132, 1134, n.1 (4th Cir. 1990).

**Figure -A-
The Current Second Circuit Infringement Standard**



**Figure -B-
The *Fiest* Infringement Standard**



**Figure -C-
The Current Ninth Circuit Infringement Standard**

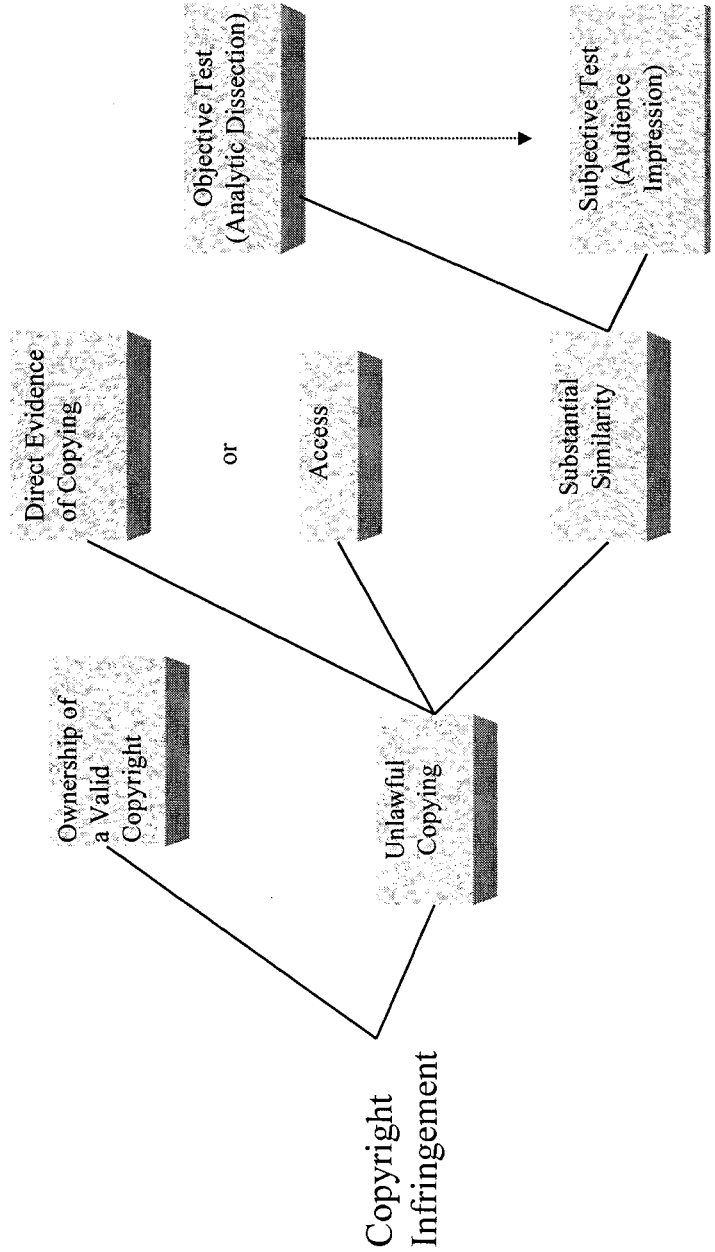
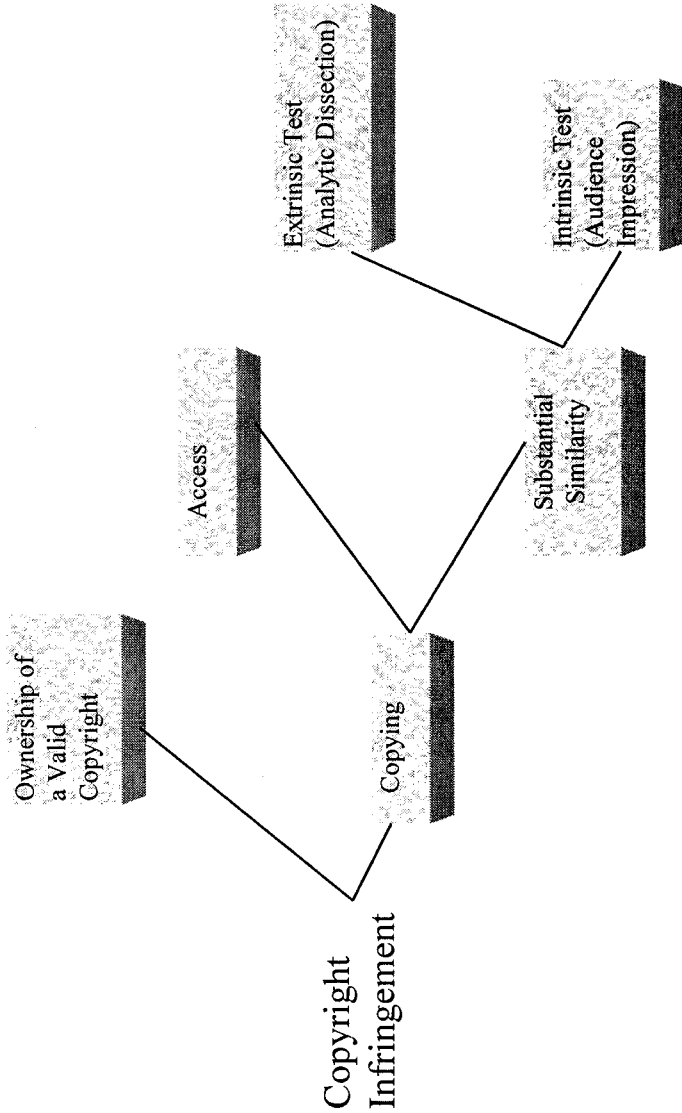


Figure -D-
The *Krofft* Infringement Standard



**Figure -E-
A Proposed Infringement Standard (Complete Form)**

