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Copyrights From a Child's Perspective

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COPYRIGHTS FROM A CHILD'S PERSPECTIVE

I. INTRODUCTION

Children have a unique perspective on life. They see the world through bright, young eyes and are usually enthusiastic about every new sight, sound, taste, and feeling. One legal scholar commented that "[c]hildhood is a time for carefree fun and play . . . in a realm protected from 'harsh realities.' "[1] Although this excitement is often refreshing, it can also mean that children do not inspect these sights and sounds as carefully as adults do and are often easily fooled by imitations. The Southern District of New York pointed out this concept in *Ideal Toy Corp. v. Fab-Lu, Ltd.*, when it stated, "[i]n [the youngsters'] enthusiasm to acquire . . . [the objects] they are certainly not bent upon 'detecting disparities' or even readily observing upon inspection such fine details . . ."[2] In *Ideal*, the plaintiff made children's dolls and claimed that the defendant had copied the dolls with the only change being a slightly different neck.[3] The court held that most adults, let alone children, would not be able to discern the difference between the two dolls and concluded that a copyright[4] infringement[5] had occurred.[6]

A psychological study also examined this concept by showing children five and under sponges that looked like rocks.[7] More often than not, these children could not tell the tester that they saw what was really there: the sponge.[8] The tester observed that "[c]hildren at this [young] age often aren't

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[1] Wendy Anton Fitzgerald, *Maturity, Difference and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 92 (1994).

[2] Ideal Toy Corp. v. Fab-Lu, Ltd., 261 F. Supp. 238, 242, 152 U.S.P.Q. (BNA) 500, 503 (S.D.N.Y 1966).

[3] *Id.*

[4] Black's Law Dictionary defines copyright as "a property right in an original work of authorship (such as a literary, musical, artistic, photographic or film work) fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work." BLACK'S LAW DICTIONARY 337 (7th ed. 1999).

[5] Copyright Infringement is defined as the "act of violating any of a copyright owner's exclusive rights granted by the federal Copyright Act, 17 U.S.C.A. §§ 106, 602" including the rights to reproduce, to prepare derivative works, to distribute copies, to perform or display publicly, for sound recordings, or importing the work into the United States. BLACK'S LAW DICTIONARY 785 (7th ed. 1999).

[6] Ideal Toy Corp., 261 F. Supp. at 241.

[7] John H. Flavell, *Really and Truly: Until They Are 4 or 5, Children Don't Understand the Distinction Between Appearance and Reality; What You See is Not Always What You Get*, PSYCHOL. TODAY, Jan. 1986, at 38, 38.

[8] *Id.*

quite able to grasp the idea that what you see is not always what you get."[9] These children were not always willing to immediately accept that the sponge was not a rock. They saw a rock.

Being able to discern and compare subtle differences between objects is important when determining whether or not a work has actually been copied. One legal scholar commented that "[c]hildren represent a distinct and significant consumer group,"[10] and they "have more money, exercise more influence on their families, and acquire their own purchasing habits and product preferences at an earlier age than did their counterparts in any previous generation."[11] Even though children do not generally purchase toys, they do tell their parents which toys they want. Parents, wanting to keep their children happy, often comply with their children's wishes. One court noted this truism when it said that often such "protected works [works aimed at children] are purchased as 'surprise' gifts—and thus necessarily outside of the child's presence. . . . [However,] their impressions and views were the primary influences on the purchase decision."[12]

Because children are more susceptible to believing that what they actually see is what they want to see and more and more works are being aimed directly at them, there should be a better means for determining when copyright infringement has occurred on goods intended for and marketed towards children. Courts should look to how the child actually perceives the article and not how an adult, or an ordinary observer,[13] would view the exact same object.

To show why different considerations are needed for works directed at children, one must first look at the evolution of the copyright infringement action and where children stand today. Part II of this Note will give a brief explanation of the history of copyright infringement actions and one of the traditional copyright doctrines, the ordinary observer test. Next, many legal

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[9] *Id.* at 38.

[10] Michael Ferdinand Sitzer, *Copyright Infringement Actions: The Proper Role for Audience Reactions in Determining Substantial Similarity*, 54 S. CAL. L. REV. 385, 411 (1981).

[11] *Id.* (quoting Schiele, *How to Reach the Young Consumer*, HARV. BUS. REV. Mar.-Apr., 1974, at 77-78).

[12] Lyons P'ship v. Morris Costumes, Inc., 243 F.3d 789, 803, 58 U.S.P.Q.2d (BNA) 1102, 1112 (4th Cir. 2001) (criticizing the district court's opinion that the perspective of the child is irrelevant because the adult decides whether to spend the money to purchase the work or not).

[13] Sitzer, *supra* note 11, at 386 (stating that an ordinary observer is an average, reasonable "spectator" of the two works).

scholars are looking into psychological aspects of laws involving children.[14] Part III gives two theories of development of the mind of a child and explains why the perspective of a child is different than that of an adult.

Next, children are treated differently, and often are given more protection, than adults are in many legal aspects. Other areas of the law recognize that the mind of a child is different and not always as perceptive as that of an adult. For example, in contract law, children cannot enter into legally binding agreements because courts fear that children do not really know what they are binding themselves or others to.[15] Further in torts, children may not be liable for something that an adult would be had the adult engaged in the exact same behavior.[16] Part IV explains how the law in general recognizes the difference between adults and children, and, then, provides a few specific examples of legal areas that have laid down special rules for children. These specific rules can be helpful to see how copyright law can evolve to apply different rules for works aimed at children as well.

Next, several courts are beginning to change the traditional ordinary observer test for substantial similarity into the "intended audience" test.[17] Part V shows how this evolution is occurring and expanding. Finally, several courts and commentators are beginning to use the child's perception as the standard for infringement cases on works directed at children. Part VI explains how these cases and their results show that this standard is acceptable, gaining popularity, and should become the majority standard applied to children's works.

II. EVOLUTION OF THE TEST FOR COPYRIGHT INFRINGEMENT ACTIONS AND THE ORDINARY OBSERVER TEST

Copyright protection stems from the Constitution, which states "Congress shall have Power . . . To promote the Progress of Science . . ., by securing for limited Times to Authors . . . the exclusive Right to their

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[14] *See generally* Lisa Perrochet & Ugo Colella, *What a Difference a Day Makes: Age Presumptions, Child Psychology, and the Standard of Care Required of Children*, 24 PAC. L.J. 1323 (1993).

[15] *See generally* Kaufman v. American Youth Hostels, Inc., 174 N.Y.S.2d 580 (N.Y. Sup. Ct. 1957).

[16] *See generally* Donald J. Gee & Charlotte Peoples Hodges, *The Liability of Children, At What Age is a Child Deemed to Have the Capacity Required for Negligence, Contributory Negligence, or Comparative Negligence?*, 35 TRIAL 52 (1999).

[17] *See generally* Dawson v. Hinshaw Music, Inc., 905 F.2d 731, 15 U.S.P.Q.2d (BNA) 1132 (4th Cir. 1990).

respective Writings . . . ."[18] One court stated that "[t]o achieve the constitutional aspirations of promoting science and the useful arts, copyright legislation 'assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.' "[19] From this grant of authority, Congress has perceived copyright protection to extend to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[20]

An early case that distinguished between ideas and expressions of those ideas was *Baker v. Selden*.[21] In that case, the Supreme Court held that while a book on accounting methods and the statements within it were copyrightable, the actual method described in the book was not. Therefore, "as embodied and taught in a literary composition or book, their [teachings and rules] essence consists only in their statement. This alone is what is secured by the copyright."[22]

Judge Learned Hand was concerned with the difficulty in discerning between ideas and expressions; therefore he derived the abstractions test.[23] In *Nichols v. Universal Pictures Corp.*,[24] the plaintiff, author of a play, alleged that the defendants infringed upon it when making a motion picture. This abstractions test is based on the concept that "[s]tanding alone, the fact that the two stories share common elements is not indicative of infringement; these elements are merely ideas [or abstracts], not subject to copyright protection. But, if these ideas were expressed similarly enough, infringement could occur."[25] Although, the "abstractions" test is helpful in the copyright

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[18] U.S. CONST. art. I, § 8, cl. 8.

[19] B. MacPaul Stanfield, *Finding the Fact of Familiarity: Assessing Judicial Similarity Tests in Copyright Infringement Actions*, 49 DRAKE L. REV. 489, 493 (2001) (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349-50 (1991)).

[20] 17 U.S.C. § 102(a) (1994).

[21] 101 U.S. 99 (1879).

[22] William M. Hart, *An Overview of the Copyright Law*, *in* COPYRIGHT & TRADEMARK LAW FOR THE NONSPECIALIST 2000, at 9 (PLI Pats., Copyright, Trademarks, & Literary Prop. Course Handbook Series No. G0-00GX).

[23] Michael L. Sharb, *Getting a "Total Concept and Feel" of Copyright Infringement*, 64 U. COLO. L. REV. 903, 910 (1993).

[24] 45 F.2d 119 (2d Cir. 1930).

[25] Sharb, *supra* note 24, at 911.

world, it really gives no guidance on the question of how much similarity is enough to constitute an infringement.

It was not until 1946 and the decision of *Arnstein v. Porter*[26] that the issue of similarity became clearer. *Arnstein* has been called a legendary decision in instructing courts on what constitutes infringement,[27] and the general test used today stems from this opinion. There, the plaintiff alleged that the defendant had plagiarized several of his songs and had been making a profit from this plagiarism. Writing for the Second Circuit, Judge Clark concluded that there were two separate elements necessary for the plaintiff to prove in an infringement action.[28] The first element is "that defendant copied from plaintiff's copyrighted work."[29] The second element is "that the copying (assuming it to be proved) went too far as to constitute improper appropriation."[30] To prove the first element, Clark stated that an admission by the defendant or circumstantial evidence, such as access to plaintiff's work, would suffice.[31] As for the second element, Clark stated that "the test is the response of the ordinary lay [person]";[32] therefore, if an ordinary person would hear or see sufficient similarities in the two works, then, infringement has occurred. Today's test for copyright infringement is based on the basic principles stated in *Arnstein*.

Presently, there are two main factors necessary for a plaintiff to prove copyright infringement.[33] To establish these elements, the plaintiff "must prove both the ownership of a valid copyright and copying by the defendant."[34] The first element is easy to satisfy. According to the Copyright Act of 1976,[35] prima facie evidence of copyright ownership can be proved by presenting a copyright registration certificate.[36]

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[26] 154 F.2d 464, 68 U.S.P.Q. (BNA) 288 (2d Cir. 1946).

[27] Stanfield, *supra* note 20, at 494.

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

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Jonathan Zavin, *Copyright Infringement Litigation*, Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series, Practicing Law Institute (2001).

[34] Warner Bros., Inc. v. Am. Broad. Co., Inc., 654 F. 2d 204, 207, 211 U.S.P.Q. (BNA) 97 (2d Cir. 1981). *See also* Chuck Blore & Don Richman, Inc. v. 20/20 Adver. Inc., 674 F. Supp. 671, 675, 5 U.S.P.Q. (BNA) 1833 (D. Minn. 1987) (holding that an issue of material fact existed with regard to the likelihood of actual confusion between two commercials, both of which featured actress Deborah Sheldon).

[35] 17 U.S.C. §§ 101-801 (1994).

[36] 17 U.S.C. § 410(c) (1994) states that:

Once ownership is proved, the court then turns to actual copying. This second element proves to be harder to establish. The easiest way to establish copying of a plaintiff's work is by direct evidence or eyewitness testimony.[37] However, because such direct proof is often hard to find, plaintiffs are allowed to use circumstantial evidence.[38] To prove copying in this manner, a plaintiff must show that the defendant had access to the copyrighted work and that the two works are substantially similar.[39] The access prong of this test is important because if the defendant never saw or heard the work, it is practically impossible that he or she could have copied it.[40] A plaintiff can prove access by showing that the defendant had an opportunity to see or hear the plaintiff's work. The plaintiff does not have to prove without a doubt that the defendant actually saw the work, only that the defendant "had the opportunity to do so."[41] However, access can be inferred by striking similarity which negates the possibility of originality or a common source.[42] Therefore, "a greater showing of similarity (as in striking similarity) will allow for a lesser showing of access."[43]

The second element required to show copying proves to be confusing due to the varying use of "substantial similarity" by different courts.[44] One court even went so far as to say "the determination of the extent of similarity which will constitute a substantial and hence infringing similarity presents one of the most difficult questions in copyright law, and one which is the least susceptible of helpful generalizations."[45] To determine whether two works are substantially similar, courts must decide whether the works contain more than the same general ideas or themes. In 1966, the Second

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> [i]n any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.

[37] Aaron M. Broaddus, *Eliminating the Confusion: A Restatement of the Test for Copyright Infringement*, 5 DEPAUL-LCA J. ART & ENT. L. & POL'Y 43, 45 (1995).

[38] *Id.*

[39] Warner Bros., 654 F.2d at 207.

[40] Broaduss, *supra* note 38, at 47.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 48.

[44] *Id.* at 49.

[45] Warner Bros., Inc. v. Am. Broad. Co., Inc., 654 F.2d 204, 207, 211 U.S.P.Q. (BNA) 97, 100 (2d Cir. 1981).

Circuit stated that "the appropriate test for determining whether substantial similarity is present is whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work."[46] For instance, in *Warner Bros.*, the plaintiff was the holder of the copyright to the character Superman and the works embodying him and claimed that the defendants infringed upon its copyright by creating a television character known as "The Greatest American Hero."[47] The Second Circuit held that the creators of Superman could not hold a monopoly on all superheroes and that the two heroes were not so similar as to cause an ordinary observer to confuse the two.[48] The court stated that the two characters have different demeanors: Superman is graceful, calm, and confidant, while the other is clumsy and nervous.[49] This extreme change in demeanors is enough for an ordinary person to differentiate between the two.[50]

While the concept of the ordinary observer is used more often in modern cases, it is said to have originated[51] in 1868 with the case of *Daly v. Palmer*[52] where the court held that a play would cause similar emotions and reactions from the ordinary audience as a copyrighted play.[53] Therefore, a normal audience would not necessarily be able to distinguish between the two plays, or, in other words, the infringing play would definitely conjure up images of the original play.

The main reason for the ordinary observer test is to "ascertain the effect of the alleged infringing [work] upon the public, that is, upon the average reasonable [person]."[54] This view probably stems from the fact that ordinary people are not experts and are not inclined to find tiny differences or similarities in every possible copyrighted thing.[55] Judge Learned Hand stated that the "ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the

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[46] Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966).
[47] Warner Bros., 654 F.2d at 205.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] Sitzer, *supra* note 11, at 389.
[52] Daly v. Palmer, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868) (No. 3,552).
[53] *Id.*
[54] Broaddns, *supra* note 38, at 62 (quoting Harold Lloyd Corp. v. Witwer, 65 F.2d 1, 18 (9th Cir. 1933)).
[55] *See* Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 124 U.S.P.Q. (BNA) 154 (2d Cir. 1960).

same."[56] Thus, the ordinary person will not be too picky about the details involved within each work.

The ordinary observer includes everyone: men, women, children, the elderly, and so on. This grouping is fine for most works that are aimed at the public in general. However, many things are directed at children specifically, not the general public. The use of the ordinary observer as the test for the substantial similarity aspect is the point where the test for children's works should diverge from the general test for copyright infringement.

Copyright law has evolved beyond its original purpose of protecting printed books. However, the child audience has been overlooked. There is no reason why it cannot continue to evolve into specifically looking at works from a child's perspective.

III. DEVELOPMENT OF A CHILD'S MIND AND THE CHILD'S PERSPECTIVE

A recent trend has been to allow psychological findings into a variety of legal arguments.[57] Legal scholars have noted that "[t]his phenomena is part of a larger trend in legal scholarship that seeks insights into resolving legal questions from academic disciplines outside the law, particularly the social sciences and humanities."[58] The field of child psychology is continuously growing, and psychologists are learning more and more about how the mind of a child works. This knowledge helps one to understand why a different standard is needed for copyrighted works aimed at children.

Prior to the 1970s, the leading view among child psychologists was that children were unable to conduct deductive reasoning until the age of fourteen or fifteen.[59] Therefore, throughout childhood, children are constantly learning and developing skills to be able to think and react to problems like adults. Further, from this view, "the capacity to grasp these concepts is an all-or-nothing proposition: Either a child is capable of understanding objective relations and using this knowledge to behave intelligently across all tasks and situations or the child is not."[60]

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[56] *Id.* at 489.

[57] Lisa Perrochet & Ugo Colella, *What a Difference a Day Makes: Age Presumptions, Child Psychology, and the Standard of Care Required of Children*, 24 PAC. L.J. 1323, 1331 (1993).

[58] *Id.*

[59] *Id.* at 1335. Jean Piaget, a Swiss psychologist, was a dominant proponent of this view.

[60] *Id.* at 1336.

Today, the field of psychology has branched into many different specialties, including cognitive psychology, which involves the study of learning and development.[61] Specifically, it is "the scientific study of mental events."[62] Psychologists study the brain and why certain people react differently to the exact same stimuli.[63] Modern psychologists take a slightly different view on the capacity of children to understand the world. An article in the Pacific Law Journal noted that:

> [u]nlike Piaget, who assumed children's thinking was qualitatively and structurally different from that of an adult, cognitive psychologists presume that the structure of children's thinking is identical to adults and that differences in capacity are due to the child's limited grasp of language, knowledge, and experience rather than some inherent defect or immaturity in thought processes.[64]

Further, modern psychologists feel that social aspects of life lend to cognitive development in children. Therefore, while disagreeing with Piaget about why, the modern theory of childhood development still recognizes that children do have different mindsets and patterns of thinking than adults.[65]

IV. HOW THE LAW VIEWS CHILDREN IN GENERAL AND IN SPECIFIC CIRCUMSTANCES

Lawmakers generally agree that children are different from adults and need special rights and protections. Elizabeth S. Scott stated that "American lawmakers have had relatively clear images of childhood and adulthood—images that fit with our conventional notions. Children are innocent beings, who are dependent, vulnerable, and incapable of making competent decisions."[66] Further, the United States Supreme Court stated that "[t]he law

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[61] Ellen D. Gagne et al., THE COGNITIVE PSYCHOLOGY OF SCHOOL LEARNING, 4 (Harper Collins College Publishers, 2d ed. 1993).

[62] *Id.*

[63] *Id.*

[64] Perrochet & Colella, *supra* note 58, at 1337-38.

[65] *Id.*

[66] Elizabeth S. Scott, *Essay: The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 547

recognizes that children—particularly young children—are not fully accountable for their actions because they lack the capacity to exercise mature judgment."[67]

Adults view children as little beings with the potential to grow up and be an adult.[68] Wendy Anton Fitzgerald stated "[t]hat children are inferior to adults under the law makes rational sense, of course, because we understand children as potential adults, and childhood as their preparation for adulthood."[69] Because of their underdeveloped cognitive skills, children cannot "employ reasoning and understanding sufficiently to make choices on the basis of a rational decision-making process,"[70] and are "innocent and naïve, if not foolish and short-sighted."[71] Further, since children have immature skills, they make decisions that may be harmful to themselves and others. Consequently, the law applies different rules for children.

The law assumes that children lack the capacity for reasoning and understanding; therefore, children "cannot vote, make most medical decisions, drink alcohol, or drive motor vehicles."[72] Also, many fear that since children are often rash, they are more vulnerable to harm than adults and need greater protections, which often means greater limitations. Children are restricted from buying certain "obscene materials" that are protected for adults under the First Amendment.[73] The idea behind such laws is that if children are exposed to such items they may exercise immature judgement, not realize the ramifications of their behavior, and find themselves in unexpected circumstances.[74] Finally, other people may know that the child does not completely understand whatever transaction may be occurring and try to manipulate the child. The Wisconsin Supreme Court summed up these fears when it said that a child "should be protected from

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(2000).

[67] Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 672 (1999) (citing 1 E. FARNSWORTH, CONTRACTS § 4.4 (2d ed. 1998)).

[68] Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 13 (1994).

[69] *Id.*

[70] Scott, *supra* note 67, at 550.

[71] Fitzgerald, *supra* note 69, at 92.

[72] Scott, *supra* note 67, at 552.

[73] *Id.* at 552-53.

[74] *Id.*

his own bad judgments as well as from adults who would take advantage of him."[75]

The above discussion shows how the law in general views children differently than adults. While the field of intellectual property, specifically copyright law, has not yet evolved to always include special rules for cases involving children and children's works, it can borrow from other areas of the law and their leading theories. Two main areas of the law that do have set rules for children are torts and contracts.[76] Below will be a brief explanation of the laws in those two areas and how their rules can be useful in determining what to do in the circumstance of children and copyrights.

In tort law, the issue of children's capacity becomes important when dealing with the question of contributory negligence.[77] Contributory negligence is "an affirmative defense which must be pled by the defendant who has the burden of proving that the plaintiff's blameworthy conduct was a contributing factor causing the plaintiff's injury or damage."[78] To prove contributory negligence, the defendant must show that the plaintiff (1) knew of the circumstances; (2) realized the danger; and (3) failed to exercise reasonable care by getting in the way of the danger.[79]

While "[c]ourts have taken different courses with varying results as to whether or when a young child is capable of contributory negligence,"[80] almost every jurisdiction has adopted some form of one of two approaches: the Illinois Rule or the Massachusetts Rule (the Modern Trend).[81] Under the Illinois rule, the determination of a child's capacity to realize the risks associated with their behavior rests solely upon age.[82] Courts utilizing this rule conclusively presume that a child under the age of seven is incapable of contributory negligence as a matter of law.[83] Further, there is a rebuttable

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[75] Kiefer v. Fred Howe Motors, Inc., 158 N.W.2d 288, 290 (Wis. 1968).

[76] *See generally* Donald J. Gee & Charlotte People Hodges, *The Liability of Children, At What Age is a Child Deemed to Have the Capacity Required for Negligence, Contributory Negligence, or Comparative Negligence?*, 35 TRIAL 52 (1999); FARNSWORTH, CONTRACTS, § 4.4 (Aspen Publishers Inc, 3d ed. 1999).

[77] *See, e.g.*, Lori Rinella, *Children of Tender Years and Contributory Negligence*, 63 UMKC L. REV. 475 (1994).

[78] *Id.* at 475-76 (citing JUDGE HENRY WOODS, COMPARATIVE FAULT § 1.12, at 4 (2d ed. 1987)).

[79] *Id.* (citing WOODS, *supra* note 79, at 8-9).

[80] *Id.* at 476.

[81] *See* Lisa Perrochet & Ugo Colella, *What a Difference a Day Makes: Age Presumptions, Child Psychology, and the Standard of Care Required of Children*, 24 PAC. L.J. 1323 (1993).

[82] *Id.* at 1365.

[83] Rinella, *supra* note 78, at 480.

presumption that children between the ages of seven and fourteen are also incapable of negligence.[84] Finally, under the Illinois rule, children over fourteen years of age are presumed to be capable of negligence with the burden shifting to the minor child to prove that he/she did not have the capacity.[85]

Proponents of this rule argue that it has several advantages, including the ease of application and a high level of predictability.[86] However, there are many critics who feel that the rule only provides useless, arbitrary age limits and has "total disregard for the child's actual knowledge and appreciation of the danger and risk of his conduct."[87] The modern rule developed to take these fears into account.

The Massachusetts rule, otherwise known as the Modern Trend, "embraces a picture of child development that treats chronological age as only one of several factors involved in the determination of whether a minor has the capacity for negligent conduct."[88] This method includes the child's knowledge and experience as factors to be used in a factual inquiry of the child's capacity.[89] If the child is "deemed to be capable of contributory negligence, the court must next determine the standard of care required of the child to be free from contributory negligence."[90] Generally, the standard of care required is that of a reasonable child of the same age, intelligence, and experience under similar circumstances.[91] The court evaluates whether the actions of the child are reasonable compared to that standard of care.[92]

No matter which view is used, all jurisdictions agree that children are different than adults and should be treated differently. While an adult might easily recognize a situation as dangerous, the danger may not be so clear to a child. Therefore, children will not always be held accountable for their behavior, even though it contributed to their injuries.

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[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at 481.
[88] Perrochet & Colella, *supra* note 82, at 1368.
[89] *Id.* at 1369.
[90] Rinella, *supra* note 78, at 483.
[91] *Id.* at 484.
[92] *Id.* (citing Peterson v. Taylor, 316 N.W.2d 869, 873 (Iowa 1982)) (stating that the standard of care of a seven-year-old child is to conduct himself as a reasonable person would under the circumstances having the child's actual age, intelligence, and experience with regard to judgment and appreciation of risk and danger).

Another area of the law that has specific rules for children is contracts. Farnsworth's TREATISE ON CONTRACTS states that "[c]ommon law courts early announced the prevailing view that a minor's contract is 'voidable' at the instance of the minor."[93] In 1914, the New York Court of Appeals stated the general rule that a child is "[r]egarded as not having sufficient capacity to understand and pass upon questions involving contractual rights, and, therefore, a person dealing with him does so at his peril, and subject to the right of the infant to avoid his contract when he becomes of age."[94] That court also stated that "[t]he rule is well understood that attempted contracts by an infant are incomplete and imperfect, and do not become valid and binding except by the act or failure to act of the infant after he reaches the age of maturity."[95] Therefore, a contract entered into by a child is not binding on the child unless he so chooses after he reaches the age of the majority. This rule has remained intact until the present day.[96]

Although the rules about children in both tort and contract law involve children who are actually parties in the lawsuits, the law of copyrights should still build from those rules. Both examples allow for a lower set of standards in cases involving children. Tort law does not hold children responsible for certain acts that adults would be liable for, and contract law allows minors to opt out of otherwise valid contracts. Traditional copyright law should expand to account for children's limited capacity and poorer understanding of general concepts. What might obviously be dissimilar to adults may not look quite so different from the eyes and perception of a child.

V. THE BEGINNINGS OF A NEW DOCTRINE—THE INTENDED USER TEST

While "[t]he traditional test for improper appropriation [in the area of copyright infringement] is the lay observer test,"[97] many courts and commentators are beginning to recognize the limitations of this test and are

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[93] FARNSWORTH, *supra* note 77 (citing 8 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 51 (1926)).

[94] *In re* Farley, State Excise Com'r, 106 N.E. 756, 757 (N.Y. 1914).

[95] *Id. See also* Kaufman v. Am. Youth Hostels, Inc., 174 N.Y.S.2d 580, 588 (N.Y. Sup. Ct. 1957) (holding that an agreement signed by plaintiff's minor daughter releasing corporation from any liability resulting from loss of property or personal injury occurring on a youth trip was not binding upon plaintiff's infant daughter, but was void or voidable).

[96] *See* FARNSWOTH, *supra* note 77.

[97] Broaddus, *supra* note 38, at 62.

applying what is known as the intended audience test.[98] Originating in *Arnstein v. Porter*,[99] one legal scholar labelled the intended audience test as "the emergence of a true audience test."[100] Moreover, he stated that *Arnstein* "represents a major breakthrough for the use of spectator reactions in copyright infringement actions, because the court finally recognized that it is the actual audience, and not some obscure notion of an average reasonable person, that provides the artist with the economic incentive to create."[101] There, the plaintiff claimed infringement of several of his musical compositions, one of which had sold over a million copies.[102] The Second Circuit stated that, "[t]he question, therefore, is whether [the] defendant took from plaintiff's works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff."[103] Arguably, a member of the audience for whom popular music is composed is a member of the general, lay population,[104] but it is still important to note that the *Arnstein* court did state that the actual listening audience fits into the evaluation of a copyright infringement case.

Expanding on *Arnstein*, other courts have followed the "intended audience" test.[105] For instance, the Fourth Circuit, in *Dawson v. Hinshaw Music Inc.*,[106] applied the intended audience test in a case involving a musical copyright infringement action.[107] However, unlike the ordinary music case, this court was faced with an unusual problem.[108] The appropriation did not involve a regular sound recording played for all to hear, but, instead, involved only written sheet music.[109] The Fourth Circuit, therefore, reversed a lower court decision, which found no copyright infringement and relied upon "an interpretation of the ordinary observer test wherein a lay

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[98] *Id.* at 64.
[99] Arnstein v. Porter, 154 F.2d 464, 68 U.S.PQ. (BNA) 288 (2d Cir. 1946).
[100] Sitzer, *supra* note 11, at 393.
[101] *Id.*
[102] *Id.*
[103] *Arnstein*, 154 F.2d at 473.
[104] Sitzer, *supra* note 11, at 393.
[105] Broaddus, *supra* note 38, at 64.
[106] Dawson v. Hinshaw Music Inc., 905 F.2d 731, 15 U.S.P.Q. 2d (BNA) 1132 (4th Cir. 1990).
[107] *Id.*
[108] Paul M. Grinvalsky, *Idea-Expression in Musical Analysis and the Role of the Intended Audience in Music Copyright Infringement*, 28 CAL. W. L. REV. 395, 407 (1992).
[109] *Id.*

listener was synonymous with a lay observer."[110] The *Dawson* Court stated that:

> obedience to the undisputed principles of copyright law and the policy underlying the ordinary observer test requires a recognition of the limits of the ordinary *lay* observer characterization of the ordinary observer test. Those principles require orientation of the ordinary observer test to the works' intended audience, permitting an ordinary *lay* observer characterization of the test only where the lay public fairly represents the works' intended audience.[111]

Therefore, the court felt that the *Arnstein* test was too broad and refined the audience test.[112]

Further, the Court stated that it read the *Arnstein* decision to logically require that the intended audience's reaction should be the relevant inquiry where such audience is considerably more specialized than a pool of lay observers.[113] The Fourth Circuit concluded that "[w]hen conducting the second prong of the substantial similarity inquiry, a district court must consider the nature of the intended audience of the plaintiff's work,"[114] and "if the intended audience is more narrow in that it possesses specialized expertise . . . that lay people would lack, the court's inquiry should focus on whether a member of the intended audience would find the two works to be substantially similar."[115] The court finally stated that the new label, the intended audience test, should replace the old one, the ordinary observer test, as the label of the appropriate test.[116]

Nevertheless, the *Dawson* court retracted somewhat by stating that the general lay public is, in most cases, a fair representation of the actual intended audience.[117] The Court further stated that "[w]e therefore believe that, in any given case, a court should be hesitant to find that the lay public

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[110] Stanfield, *supra* note 20, at 504.
[111] Dawson v. Hinshaw Music, Inc., 905 F.2d 731, 733 (4th Cir. 1990).
[112] Stanfield, *supra* note 20, at 505.
[113] Dawson, 905 F.2d at 734.
[114] *Id.* at 736.
[115] *Id.*
[116] *Id.*
[117] *Id.* at 737; *see also* Grinvalsky, *supra* note 109, at 407.

does not fairly represent a work's intended audience" and that deviance from the lay person standard is justified only in the specific circumstances where the intended audience has special knowledge.[118]

Therefore, while the *Dawson* court did adopt the "intended audience" standard for judging the substantial similarity prong of copyright infringement actions and helped to further open the door to allowing a separate test for works directed at a specialized audience, it also left the waters slightly muddy. One commentator noted that even after *Dawson*, "a straight forward application of the test is difficult at best to achieve."[119] However, several cases have used the rules pronounced in *Arnstein* and *Dawson* to imply a separate rule for copyright infringement cases involving works aimed at children.

VI. CASES UTILIZING A DISTINCT RULE IN ACTIONS INVOLVING CHILDREN

One of the first copyright infringement cases to single out children was *Ideal Toy Corp. v. Fab-Lu, Ltd.*[120] There, the plaintiff was one of the largest manufacturers of dolls in the United States and claimed that the defendant copied one of its very successful line of dolls.[121] The defendant's dolls had slight differences in appearance from the plaintiff's, such as poorer craftsmanship and different neck molding.[122] However, the overall aesthetic appeal of the dolls was the same. The Ninth Circuit stated that "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook . . . and regard [the] aesthetic appeal as the same."[123] The Court further stated that this ease of overlooking the disparities is especially important because the appeal of the toys lies with children.[124]

The Court went on to conclude that "in applying the test of the average lay observer, they [youngsters] are not to be excluded—indeed they are the

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[118] Dawson v. Hinshaw Music, Inc., 905 F.2d 731, 737 (4th Cir. 1990).
[119] Grinvalsky, *supra* note 109, at 408.
[120] 261 F. Supp. 238, 152 U.S.P.Q. (BNA) 500 (S.D.N.Y. 1966).
[121] *Id.* at 239.
[122] *Id.* at 240.
[123] *Id.* at 241 (quoting Chief Judge Learned Hand in Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489, 124 U.S.P.Q. (BNA) 154, 155 (2d Cir. 1960)).
[124] *Ideal Toy Corp.*, 261 F. Supp. at 241.

'far-flung faithful . . . audience.' "[125] It is the children who influence their parents to go out to the stores and buy these dolls;[126] therefore, they should not be left out of the equation when determining whether a work has been infringed upon or not.

While the *Ideal* court did not specifically delineate a rule for separating an infringement analysis when the work involved is aimed at children, it did include children into the large group of ordinary observers. Several courts have used this idea in recognizing children as a distinct group. Thus, the decision helped to lay the groundwork for implementing just such a rule.

In *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*,[127] the plaintiffs, the Kroffts, were puppeteers who had created a popular Saturday morning children's television show, *H.R. Pufnstuf*. The series revolved around several costumed characters, including the mayor, Pufnstuf, living in a fantasyland called "Living Island."[128] The television show became widely popular among children and generated a line of products and endorsements. The Kroffts claimed that the defendant, McDonald's, had infringed upon the *Pufnstuf* series through its successful ad campaign known as *McDonaldland*, which included, among other things, a mayor known as Mayor McCheese.[129]

Using the intended audience laid out in *Arnstein*, the Ninth Circuit reasoned that "[t]he question, therefore, is whether defendant took from plaintiff's works so much of what is pleasing to the [eyes and] ears of lay [persons], who comprise the audience for whom such popular [works are] composed, that defendant wrongfully appropriated something which belongs to the plaintiff."[130] The court took particular notice of the fact that both works here were directed at children.[131] The Ninth Circuit concluded that "[t]he present case demands an even more intrinsic determination because both plaintiffs' and defendants' works are directed to an audience of children. This raises the particular factual issue of the impact of the respective works

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[125] *Id.* at 241 (quoting Rushton v. Vitale, 218 F.2d 434, 436, 104 U.S.P.Q. (BNA) 158, 159 (2d Cir. 1955)).

[126] *Id.* at 242.

[127] 562 F.2d 1157, 196 U.S.P.Q (BNA) 97 (9th Cir. 1977).

[128] *Id.* at 1161.

[129] *Id.* at 1166.

[130] *Id.* at 1165 (quoting Arnstein v. Porter, 154 F.2d 464, 472-73, 68 U.S.P.Q. (BNA) 288, 296-97 (2d Cir. 1946)).

[131] Sitzer, *supra* note 11, at 410.

upon the minds and imaginations of young people."[132] The defendant, McDonalds, tried to differentiate its characters from the Pufnstuf characters:

> Pufnstuf wears what can only be described as a yellow and green dragon suit with a blue cummberband from which hangs a medal which says 'mayor.' 'McCheese' wears a version of a pink formal dress 'tails' with knicker trousers. He has a typical diplomat's sash on which is written 'mayor,' the 'M' consisting of the McDonald's trademark of an 'M' made of golden arches.[133]

The court rejected this argument stating that "[w]e do not believe that the ordinary reasonable person, let alone a child, viewing these works will even notice" these subtle, detailed distinctions.[134]

Again, the *Krofft* case did not expressly state a different rule for copyrighted works directed towards children; however, this case, like the *Ideal Toy Comp.* decision, recognized that children must be included in a factual determination of whether two works are substantially similar. Moreover, the *Krofft* decision specifically pointed out that the impact of the works on the minds and imaginations of children is a valid inquiry that courts should make.

Another case incorporating a child's perspective is *Atari, Inc. v. North American Philips Consumer Electronics Corp.*[135] This case involved an electronic arcade game known as *PAC-MAN*. The game consisted of a little yellow "gobbler" who, under the control of the player, was guided through a four-sided maze filled with dots and power capsules (for the gobbler to eat).[136] The infringing work also contained a rectangular maze through which a "gobbler" was guided with the goal of avoiding monsters and trying to eat moving dots and power capsules.[137] The defendants stated that their game was substantially different because they included moving dots, maze

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[132] Sid & Marty Krofft Television Prods., Inc. v. McDonalds Corp., 562 F.2d 1157, 1166, 196 U.S.P.Q.2d (BNA) 97, 104 (9th Cir. 1977).

[133] *Id.*

[134] *Id.* at 1167.

[135] 672 F.2d 607, 214 U.S.P.Q (BNA) 33 (7th Cir. 1982) (superseded by statute on other grounds as stated in Scandia Dawn Corp. v. Euroquilt, Inc., 772 F.2d 1423 (7th Cir. 1985)).

[136] *Atari*, 672 F.2d at 610.

[137] *Id.* at 611.

variations, and facial feature changes in the characters.[138] The Seventh Circuit concluded that the detailed differences did not matter, especially in cases concerning children's works.[139] The court stated that "[v]ideo games, unlike an artist's painting or even other audiovisual works, appeal to an audience that is fairly undiscriminating insofar as their concern about more subtle differences in artistic expression."[140]

Therefore, children just want to play the game and are not necessarily worried about tiny details, such as maze shape variations. Unless the differences are very dramatic, a child interested in the game may not even notice changes, even though an adult would. The *Atari* opinion demonstrated that since children do not judge works as carefully as adults, works directed at them require a different test for a finding of substantial similarity.

While the cases above incorporate a child's perspective into their tests, the following two cases are examples of decisions that actually state that the substantial similarity test should be filtered through the eyes of a child. A Ninth Circuit decision from 1987, *Aliotti v. R. Dakin & Co.*, determined that the ordinary observer test should be somewhat tailored when dealing with children and copyrighted works aimed at them.[141] In that case, the plaintiffs held a copyright on a line of stuffed toy dinosaurs known as "Ding-A-Saurs."[142] The defendants manufactured their own line of stuffed dinosaurs known as the "Prehistoric Pet" line.[143] In determining whether the two lines were substantially similar, the Ninth Circuit stated, "we may find substantial similarity of expression only if a reasonable observer would infer that Dakin's dolls capture the 'total concept and feel' of Shelley Aliotti's designs. Because children are the intended market for the dolls, we must filter the intrinsic inquiry through the perception of children."[144]

The *Aliotti* decision is important not only because the court used the perspectives of children as a threshold test, but also because it declined to find the two works not substantially similar.[145] The court held that the similarity test is not "satisfied merely because the [two lines of dinosaurs]

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[138] *Id.* at 620.
[139] *Id.* at 619.
[140] *Id.* at 619.
[141] Aliotti v. R. Dakin & Co., 831 F.2d 898, 902, 4 U.S.P.Q.2d (BNA) 1869, 1872 (9th Cir. 1987).
[142] *Id.* at 899.
[143] *Id.* at 900.
[144] *Id.* at 902.
[145] *Id.*

share similar postures and body designs. Substantial similarity of expression cannot be established by the fact that both lines of dinosaurs are gentle and cuddly, given that stuffed animals are intended for children and are usually designed to be soft and nonthreatening."[146] Thus, this decision shows that just because more protection is provided to works aimed at children, it does not necessarily follow that a defendant cannot show dissimilarity.

A recent and decisive ruling on the issue of copyrighted material aimed at children is the case of *Lyons Partnership, L.P. v. Morris Costumes, Inc.*[147] This case revolved around a lovable purple dinosaur named Barney. The plaintiff, Lyons Partnership, L.P. [Lyons], owned all the intellectual property rights to the character "Barney." Barney was a Tyrannosaurus Rex with a green chest and belly, green spots on his back and yellow toes.[148] Barney had his own television show, *Barney and Friends*, on the Public Broadcasting Network and had a huge following with young children. In fact, the show was viewed weekly by 14 million youngsters, and over 50 million copies of Barney videos have been sold.[149] When Barney appeared live, Lyons had complete control over the adult inside the costume because of the fear that an unauthorized person may behave inappropriately and hurt Barney's reputation as a kind friend to all.[150] Further, Lyons refused to license any Barney costumes.[151] The defendant owned a costume rental shop that rented a purple reptilian costume called "Duffy the Dragon."[152] Lyons sued the defendant for copyright infringement.[153]

The district court found that the Duffy costume did not infringe on Lyons' copyright because it "is not . . . similar to Barney . . . when viewed from the perspective of the average adult renter or purchasers of these costumes."[154] The district court further felt that the "perspectives of children were irrelevant" to the determination since adults were actually the ones to rent or purchase the costume; children simply viewed the costumes on the

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[146] *Id.* at 901.

[147] 243 F.3d 789, 58 U.S.P.Q.2d (BNA) 1102 (4th Cir. 2001).

[148] Lyons P'ship, 243 F.3d at 795.

[149] *Id.*

[150] *Id.* (stating that "Lyons does not license Barney costumes because of its inability to police the behavior of those who might appear in the costume").

[151] *Id.*

[152] *Id.* at 795-96.

[153] Lyons P'ship, L.P. v. Morris Costumes, Inc., 243 F.3d. 789, 795, 58 U.S.P.Q.2d (BNA) 1102, 1105 (4th Cir. 2001).

[154] *Id.* at 801.

adults.[155] The Ninth Circuit disagreed with that holding and stated that "this exclusive focus on the average adult's perspective is too narrow and fails to apply the established principles of the circuit."[156] The Court held that when the copyrighted work is clearly intended for a specific group, the court's inquiry must be premised upon the perspective of persons within that group.[157] Therefore, the "similarity of child-oriented works must be viewed from the perspective of the child audience for which the products were intended."[158]

The Court added that "[e]ven if adults can easily distinguish between Barney and Duffy, a child's belief that they are one and the same could deprive Barney's owners of profits in a manner that the Copyright Act[159] deems impermissible."[160] The Court realized that children are extremely influential on the purchases of works directed towards them. Consequently, it stated that "even though children were not present during any of the purchases or rentals testified to at trial, their impressions and views were the primary influences on the purchase decision."[161] In fact, the adult's actions of renting the costumes for children's parties and gatherings further prove that children were the real intended audience.[162] Moreover, "the entertainment of the children with the costumes could have a direct economic impact on later wishes, later purchases, and general good will in an economic sense—a potentially detrimental impact which the Copyright Act seeks to protect."[163]

The Ninth Circuit also recognized that more inventors and manufacturers might be at risk for liability, thereby, increasing the number of copyright infringement cases. The court stated that "by considering the perspectives of young children in the substantial-similarity analysis, the potential liability for infringement might tend to broaden, given the reduced ability of young children to distinguish between objectively different items and concepts."[164]

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[155] *Id.* at 802.
[156] *Id.* at 801.
[157] *Id.* (citing Dawson v. Hinshaw Music, Inc., 905 F.2d 731, 733 (4th Cir. 1990)).
[158] Lyons P'ship v. Morris Costumes, Inc., 243 F.3d 789, 802, 58 U.S.P.Q.2d (BNA) 1102 (4th Cir. 2001) (quoting Dawson v. Hinshaw Music, Inc., 905 F.2d 731, 736 (4th Cir. 1990)).
[159] U.S.C. §§ 101-1101 (1994).
[160] Lyons, 243 F.3d at 803.
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*

However, the court found that this concern was mitigated because "to the extent that liability is broadened, it represents the reality of the confusion and economic loss to the copyright owner."[165] Hence, the only way to realize the goals of the Copyright Act was to view Barney in the same way that children do.

This case demonstrates that courts recognize that children can and do influence the buying decisions of adults and, further, that their views and perceptions are important in the world of copyrights.

VII. CONCLUSION

In 1981, one legal scholar commented that "[i]t is unfortunate that the several cases involving child-oriented works, in which an affirmative effort was made to isolate the child audience, represent the exception rather than the rule."[166] This remains true today even though the law of copyrights is continuing to evolve, courts are continuing to refine it, and even more research on the mind of a child has been done.

Most children live in their own happy worlds. They play with their toys and make them come to life. They do not know what a copyright is, much less how to infringe on one. They are not cognizant of the "sharp" business practices of some marketeers who steal another's original expression for their own pecuniary gain. They do not realize that what you see is not always what you get and are often easily fooled by knock-offs with only slight differences from the copyrighted work. Sometimes children realize too late and are disappointed; sometimes they may never realize what has happened and continue to play with the knock off, thinking that they have the original.

Recently, psychological studies have found their way into the legal arena.[167] Psychology, especially in the field of cognition, has added much to our knowledge of children and how their minds work. Under both the traditional and modern theories, psychologists agree that children have

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[165] Lyons P'ship, L.P. v. Morris Costumes, Inc., 243 F.3d 789, 803, 58 U.S.P.Q.2d (BNA) 1102, 1112 (4th Cir. 2001).

[166] Sitzer, *supra* note 11, at 415.

[167] *See supra* notes 58-66 and accompanying text.

different perspectives on the world, different patterns of thinking, and different behaviors than adults.[168]

Further, lawmakers even agree that children need special rights and protections. Children are not allowed to vote, drink alcohol, or drive under the American system. The law assumes that children lack the reasoning and capacity to be able to do those types of activities rationally and responsibly.[169] Moreover, both tort and contract law employ special rules for children. Tort law often allows children to get away with behavior that would probably not be tolerated in adults, and, many times children will not be held liable for contributing to their own harm.[170] The law of contracts also allows a minor to avoid a contract without consequence.[171] In both torts and contracts, courts have reasoned that children perceive and interact with the world differently than adults.[172] Likewise, copyright law should incorporate special rules for cases involving children.

Already, the "intended audience" test has become the preferred test for many courts, even if the courts do find the intended audience to be the ordinary lay person. A few courts have been aggressive and allowed more specialized tests for infringement cases involving works aimed at children.[173] The Ninth Circuit in *Lyons*[174] recognized that children perceived things more simplistically than adults did. Therefore, the court ruled that works directed at children require a different test for a finding of similarity, since the ones most excited about the works cannot easily differentiate between similar products.

Michael Sitzer stated that "[c]hildren represent a distinct and significant consumer group."[175] More and more products are being aimed at them, and in their haste to acquire the best toys, children often do not stop to examine the differences between similar works. For these reasons, works directed at children need a greater copyright infringement protection. The perspectives

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[168] Perrochet & Colella, *supra* note 58, at 1337-38.
[169] Scott, *supra* note 67, at 547.
[170] *See supra* notes 78-93 and accompanying text.
[171] *See supra* notes 94-97 and accompanying text.
[172] *Id.*
[173] *See supra* notes 121-66 and accompanying text.
[174] Lyons P'ship L.P. v. Morris Costumes, Inc., 243 F.3d 789, 58 U.S.P.Q.2d (BNA) 1102 (4th Cir. 2001).
[175] Sitzer, *supra* note 11, at 411.

and viewpoints of children should be considered when questioning whether two or more works are substantially similar.

The law of copyrights began with a clause in the Constitution[176] and has vastly grown over the past two hundred years. It started off slightly muddled and confusing and has become more defined with many rules each with their own prongs.[177] However, it has not grown quite enough.

If other areas of the law have evolved so that the majority of courts apply different reasoning when dealing with children, why can't the law of copyrights do the same?

MONICA VINING

[176] U.S. CONST. art. I, § 8, cl. 8.
[177] *See supra* notes 19-56 and accompanying text.