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Sarah Brashears-Macatee

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TOTAL CONCEPT AND FEEL OR DISSECTION?:
APPROACHES TO THE MISAPPROPRIATION TEST
OF SUBSTANTIAL SIMILARITY

SARAH BRASHEARS-MACATEE*

I. INTRODUCTION

The United States Constitution allows Congress to pass laws "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ."1 The first copyright laws were enacted by Congress in 17902 and, today, under the Copyright Act of 1976,3 authors may receive copyright protection if their work is: 1) an original work of authorship; and 2) fixed in a tangible medium of expression, where it can be perceived, reproduced, or otherwise communicated.4 The underlying premise of copyright law is that progress of the arts is promoted by granting talented creators, for a limited time, exclusive control over their creations.5 Thus, copyright law provides authors with the incentive to create works and, after a period of protection, permits the public free access to these works.6

Copyright protection commences at the time of the work's creation.7 Registration has some impact on the remedies provided to the copyright owner,8 but these formalities do not involve any substantive evaluation of the work. The ease with which a party obtains copyright protection

* J.D., 1993, University of Nebraska College of Law. Ms. Macatee will be joining the law firm of Fulbright & Jaworski in Houston, Texas in August, 1993. This Note won first place in the 1992 ASCAP Nathan Burkan Memorial competition at UNL and has been entered in the national competition. The author would like to thank Professor Robert Denicola and Steve Thomas for their thoughtful comments.

4. Id. § 102(a).
6. See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (Copyright protection "is intended to motivate the creative activity of authors . . . by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.").
8. For example, the owner cannot sue for infringement unless the work has been registered. Id. § 411. In addition, statutory damages and attorney's fees may not be available for infringing acts which occurred before registration. Id. § 412.
stands in sharp contrast to the procedural aspects that must be overcome to obtain either a federal trademark or patent. Once a work is protected by a valid copyright, an author can maintain a cause of action against unauthorized use of the work. To demonstrate copyright infringement, a plaintiff must establish that: 1) he or she owns the valid copyright in question; 2) defendant copied plaintiff's work or had access to the copyrighted work affording defendant an opportunity to copy plaintiff's work; and 3) substantial similarity exists between the two works. The issues of copyright ownership and access are typically not difficult to resolve. Thus, it is the issue of substantial similarity that lies at the heart of many infringement claims, and—as one commentator has observed—"[s]ubstantial similarity is difficult, if not impossible, to define." Professor Melville Nimmer has articulated the concept of substantial similarity in the following manner:

It is clear that slight or trivial similarities are not substantial and are therefore non-infringing. But it is equally clear that two works may not be literally identical and yet, for purposes of copyright infringement, may be found to be substantially similar. The problem, then, is one of line drawing. "Somewhere between the one extreme of no similarity and the other of complete and literal similarity lies the line marking off the boundaries of 'substantial similarity.'


12. Michael Ferdinand Sitzer, Note, Copyright Infringement Actions: The Proper Role for Audience Reactions in Determining Substantial Similarity, 54 S. Cal. L. Rev. 385, 385 (1981). See also 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[A] (1992) [hereinafter NIMMER]; Robert Fuller Fleming, Substantial Similarity: Where Plots Really Thicken, 19 COPYRIGHT L. SYMP. (ASCAP) 252, 262 (1971) ("This nebulous area of similarity is the heart of copyright law, and no doubt it is the most evasive part."); Amy B. Cohen, Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity, 20 U.C. Davis L. Rev. 719, 722-23 (1987) ("It is a phrase that, instead of becoming more understood with each judicial interpretation, has become more ambiguous.").

13. NIMMER, supra note 12, § 13.03[A], at 13-28 (citations omitted).

right does not protect ideas, systems, methods or processes, facts, titles, words, short phrases or idioms, plots (if general), themes, scenes-a-faire, or literary characters (unless the character has been sufficiently developed). Therefore, discounting "uncopyrightable" or "nonprotectable" material from the substantial similarity calculus may make sense.

The Supreme Court, in Feist Publications, Inc. v. Rural Telephone Service Co., recently defined the essential element of an infringement claim as "copying of constituent elements of a work that are original." This language emphasizes the purpose of the copyright statutes—to protect original works of authorship. At issue in Feist were the white pages of a telephone directory. The Court found defendant's conduct noninfringing as a matter of law, given that the material taken by defendant was not original. Thus, Feist clearly stands for the proposition that literal copying is not actionable when the copying is limited to unoriginal expression. But what should be done when a defendant appropriates material that is both original (therefore protectable) and unoriginal (therefore nonprotectable)? Should the works be examined in their en-

23. See, e.g., Warner Bros. Pictures, Inc. v. Columbia Broadcasting Sys., Inc., 216 F.2d 945, 950 (9th Cir. 1954), cert. denied, 348 U.S. 971 (1955) (This case involved the sale of the story "The Maltese Falcon." "The characters were vehicles for the story told . . . .," and were found not to be copyrightable); Lone Ranger, Inc. v. Cox, 39 F. Supp. 487, 490 (W.D.S.C. 1941), rev'd on other grounds, 124 F.2d 650 (4th Cir. 1942) ("Neither is the plaintiff entitled under its copyright to a monopoly of a mere character as such.").
25. Id. at 1295.
26. NIMMER, supra note 12, § 13.03[B], at 13-64.
tirety to determine the extent of substantial similarity? Or should the nonprotectable elements somehow be "dissected out" or excised from the whole, leaving only the works' protectable elements to be examined? A perusal of infringement cases indicates that the courts have used both approaches; the differences seemingly due to the nature of the work being examined.

The purpose of this Note is to evaluate the two methods of approaching substantial similarity when a defendant has copied both protectable and nonprotectable elements of a plaintiff's work. Part II of this Note presents a general overview of the substantial similarity test. The test has been applied in two ways, both utilizing a two-step application.  

Part III of this Note examines cases that approach substantial similarity with the view that a work should be examined in its entirety, then follows with an examination of cases that take the opposite approach by excising nonprotectable elements from the whole. Part IV examines whether patterns appear in the approach based on the particular nature of the work involved (e.g., musical works, literary works) and whether it is sensible to treat different types of works differently. Part IV also examines whether general principles exist that might be applied in approaching particular types of works. This Note concludes with a brief examination of a possible interpretation of Feist, as suggested by Professor Nimmer, detailing how that interpretation would dictate the approach to substantial similarity regardless of the type of work involved.

II. SUBSTANTIAL SIMILARITY IN GENERAL

Substantial similarity is the final inquiry of the three-prong test for infringement, as discussed in Part I. The substantial similarity issue has been broken down into two queries: First, was there copying? Second, was there misappropriation (defendant appropriated protected elements from plaintiff's work)? Copying can be proven by access and

27. See infra text accompanying notes 34-47.
28. See infra text accompanying notes 50-69.
29. See infra text accompanying notes 70-88.
30. See infra text accompanying notes 89-162.
31. See infra text accompanying notes 163-66.
32. NIMMER, supra note 12, § 13.03[E][1][b], at 13-78.1 to 13-78.4(1).
33. See infra text accompanying notes 167-69.
34. See supra note 12 and accompanying text. The phrase "substantial similarity" is sometimes used to refer to both the evaluation of whether there has been copying and whether defendant has taken enough of the work to constitute infringement, and sometimes only to the second evaluation. This Note uses the phrase in the first context.
35. Case authority for this notion dates back at least to Daly v. Palmer, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868) (No. 3552), and was made explicit by the Second Circuit in Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946).
similarity, although "if there are no similarities, no amount of evidence of access will suffice to prove copying. If there is evidence of access and similarities exist, then the trier of fact must determine whether the similarities are sufficient to prove copying." 36 Under the guidelines established by the Second Circuit in Arnstein v. Porter, copying may be proven by expert testimony and analysis. 37 Courts have suggested that the works at issue should be compared in their entirety, including both protectable and non-protectable elements. 38 The comparison should reveal whether defendant independently created the work.

The second question, that of misappropriation, however, is to be determined by "the response of the ordinary lay [person]," 39 and has been termed the "audience test." 40 The Arnstein court held that no expert testimony, detailed analysis, or careful dissection is proper in the audience test. 41 Instead, misappropriation—"an issue of fact which a jury is peculiarly fitted to determine" 42—should be determined by an ordinary observer's impression of the entire work. Thus, while the test for copying is to be made by expert dissection and analysis, the misappropriation test is to be applied by an ordinary observer based on his or her overall impression of the work.

In Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 43 the Ninth Circuit—for reasons not germane to this Note—articulated a test that was different from Arnstein. 44 The Krofft court referred to the copying question as the "extrinsic test" and the misappropriation question as the "intrinsic test." 45 As in Arnstein, the copying question (extrinsic test) is to be resolved by experts, and analytic dissection is appropriate. 46 The misappropriation question (intrinsic test) is to be resolved by the trier of fact, responding as would an ordinary observer.

37. Id.
42. Id.
43. 562 F.2d 1157 (9th Cir. 1977).
44. For a comparison of these cases see Alan Latman, "Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187, 1202-03 (1990).
45. Sid & Marty Krofft Television Prosds., Inc. v. McDonald's Corp., 562 F.2d 1157, 1163-65 (9th Cir. 1977). But see Shaw v. Lindheim, 919 F.2d 1353 (9th Cir. 1990) (reinterpreting the Krofft test); and infra note 152.
46. Id. at 1164.
person.\textsuperscript{47}

This Note focuses on the second test—referred to as “misappropriation” in \textit{Arnstein} or “the intrinsic test” in \textit{Krofft}. Interestingly, whether one is inclined to take a “dissection” approach or a “totality” approach to the question of misappropriation, both expert analysis and dissection are appropriate to determine copying under \textit{Arnstein} and \textit{Krofft}. Under either approach, the trier of fact will decide both issues and, therefore, may be exposed to expert analysis and dissection in the determination of copying. The trier of fact then will be instructed to strike this information from memory when determining misappropriation. Thus, the court and the jury must keep track of the exact issue being decided. For example, the court in \textit{Universal Athletic Sales v. Salkeld}\textsuperscript{48} could infer only that the district court had addressed the copying issue but not the misappropriation issue, because the district court seemed to be dissecting rather than using the ordinary observer test.\textsuperscript{49}

\section*{III. Protection of Works Where Defendant Has Taken Protectable and Nonprotectable Elements}

That two works can have protectable and nonprotectable elements of similarity is beyond dispute. How courts should consider those elements is not yet settled. Should the entire work, including nonprotectable elements, be considered as a whole in determining misappropriation? Or, alternatively, should nonprotectable elements be excised before comparing the works?

\subsection*{A. The “Total Concept and Feel” Approach}

The phrase “total concept and feel” was coined in a 1970 Ninth Circuit opinion\textsuperscript{50} and resurfaced in a 1976 Second Circuit case involving a children’s story.\textsuperscript{51} One year later, the phrase became an important touchstone in copyright law when the Ninth Circuit used it to describe the similarities between plaintiffs’ and defendant’s works in \textit{Sid & Marty Krofft Television Productions, Inc. v. McDonald’s Corp.}\textsuperscript{52}

In \textit{Krofft}, plaintiffs claimed that defendant’s advertising campaign

\begin{thebibliography}{99}
\bibitem{47} Id.
\bibitem{49} Id. at 907.
\bibitem{50} Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970). \textit{See generally Nimmer, supra note 12, § 13.03[A][1][c], at 13-37 to 13-41.}
\bibitem{52} 562 F.2d 1157 (9th Cir. 1977).
\end{thebibliography}
infringed their copyright in "H.R. Pufnstuf," a Saturday morning television show involving fantasy characters living in an imaginary land. Access was not at issue in *Krofft*, as defendant had been negotiating with plaintiffs for a license to use the Pufnstuf characters in an advertising campaign. The court developed the bifurcated test discussed previously and, in regard to the intrinsic test, stated: "It is clear to us that defendants' works are substantially similar to plaintiffs'. They have captured the 'total concept and feel' of the Pufnstuf show." In discussing "total concept and feel," the *Krofft* court disapproved of defendant's penchant for pointing out minor differences between the works—such as defendant's mayor wearing a diplomatic sash as opposed to plaintiff's mayor wearing a cummerbund.

Not surprisingly, the courts have perpetuated the total concept and feel approach to misappropriation. As one commentator has stated:

> The appeal of the "totality" infringements approach is evident. The task of the fact-finder is simplified because it can examine the work in its entirety, and decide, without much analysis, whether a subsequent author took "the heart" of the original work. There is no need for a careful, refined separation of fact and expression. Moreover, a "totality" approach allows a fact-finder to respond to a visceral feeling that something unfair was done.

In fact, it seems that such an approach is *required* under the *Arnstein* and *Krofft* audience test where "dissection" is used only when determining copying. But, if defendant is found to have taken both copyrightable and noncopyrightable elements, considering nonprotectable elements in the test for misappropriation may be problematic. After all, elements not protectable under copyright law cannot be misappropriated.

An analogy might be made between taking the total concept and feel approach to works comprised of both protectable and nonprotectable elements and the approach to misappropriation used with compilations. The individual facts that compose a compilation are not copyrightable in themselves. However, a compilation of facts is copyrightable if the selection and arrangement of the facts is sufficiently original. Applying this rationale to other works, it follows that although individual elements

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53. *Id.* at 1162.
54. *Id.* at 1161.
55. See *supra* text accompanying notes 44-47.
56. *Id.* at 1167 (quoting Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir. 1970)).
57. *Id.*
may not be copyrightable, the composite work would be protectable if the elements were assembled in a creative or original way.

The Seventh Circuit appeared to adopt this approach in the 1989 case Roulo v. Russ Berrie & Co. In Roulo, plaintiff claimed infringement of her copyright in a greeting card line. The cream-colored, single-faced greeting cards were inscribed with sentimental messages. As in Krofft, copying was not at issue because defendant had distributed plaintiff's cards under a two-year contract prior to the alleged infringing action. Plaintiff did not renew the contract, whereupon defendant began to manufacture cards comparable to plaintiff's. The Roulo court relied on its previous decision in Atari, Inc. v. North American Philips Consumer Electronics Corp., holding that "dissection of the subject matter into copyrighted and unprotected elements is generally rejected in favor of examining the 'total concept and feel' of the copyrighted work."

In Roulo, defendant argued that the district court erred in allowing the jury to consider elements of similarity unprotected by copyright law, such as the size and color of the cards, the color of the ink and border design, the frequent use of ellipses in the messages, and the single-side format. The Seventh Circuit responded, "While it is true that these elements are not individually capable of protection ... it is the unique combination of these common elements which form the copyrighted material." The court further stated, "[Roulo's] copyright is in the artistic combination of all the common elements in the ... design."

Thus, the total concept and feel rubric has gained at least limited acceptance as an approach to the misappropriation test of substantial similarity, having been looked upon with favor and applied by courts such as the Seventh Circuit in Roulo. As pointed out by Professor Nimmer, however, "concepts" are statutorily ineligible for copyright protection and the addition of "feel" to the approach does little to clarify the already convoluted issue of substantial similarity.

60. 886 F.2d 931 (7th Cir. 1989), cert. denied, 493 U.S. 1075 (1990).
61. Id. at 934.
62. Id.
63. 672 F.2d 607 (7th Cir.), cert. denied, 459 U.S. 880 (1982). In Atari, the audiovisual display of defendant's K.C. Munchkin game substantially appropriated plaintiff's PAC-MAN computer game. Id. at 618.
64. Roulo, 886 F.2d at 939.
65. Id.
66. Id. at 940.
67. NIMMER, supra note 12, § 13.03[A][1][c], at 13-40.
69. See supra text accompanying notes 12-23.
B. The Dissection Approach

In contrast to the total concept and feel approach to the misappropriation inquiry under substantial similarity, only one case appears to have clearly articulated its adoption of the dissection approach. Courts have applied this approach in many cases, however, no doubt due in part to their awareness that some elements are ineligible for copyright protection. Confusion in the courts has also been common as to which test of substantial similarity (copying or misappropriation, extrinsic or intrinsic) to deal with, leading to the use of information obtained upon expert or detailed analysis on the first issue when considering the second issue. As discussed previously, this use is incorrect under both Arnstein and Krofft. Finally, even if misappropriation is clearly at issue, the ordinary observer—when considering appropriation—probably is unable to disregard the analysis and expert testimony proper under the proof of copying test.

Understanding the meaning of “dissection” is essential when considering the dissection approach. Certainly, dissection cannot mean breaking down works into their smallest parts, such as words in a book or notes in a song. Those elements are clearly not copyrightable and excising those elements would leave nothing to protect. But if one doesn’t look to the smallest element, where should one look? To a sentence, a paragraph, a chapter of a literary work? To one, two, three or more bars of a musical work? Such uncertainty makes the substantial similarity determination all the more difficult. Yet, as discussed below in this Note, courts do appear to utilize different levels of dissection, and the level used depends on the nature of the work.

In Concrete Machinery Co. v. Classic Lawn Ornaments, Inc. plaintiff alleged copyright infringement of seven concrete lawn ornaments. Some of the designs were based on variously posed realistic figures of animals, such as swans or deer. The court recognized that the idea of naturalistic depictions of animals is ineligible for copyright protection,

70. See Concrete Mach. Co. v. Classic Lawn Ornaments, 843 F.2d 600, 608-09 (1st Cir. 1988) and infra text accompanying notes 75-80.
72. See supra text accompanying notes 47-49.
73. See supra text accompanying notes 47-48.
74. See infra part IV. D.
75. 843 F.2d 600 (1st Cir. 1988).
76. Id. at 603.
77. Id.
and that plaintiff could only prohibit actual copying of its own version of realistic-looking concrete animals.\textsuperscript{78} However, the court cautioned that proof of copying may be difficult because, for example, "[one] statue is a detailed replica of a real deer, [therefore] the deer, in essence, supplied most of the features ... [and] any subsequent artist can also take from the real deer."\textsuperscript{79}

The court in \textit{Concrete Machinery} went on to instruct the lower court that, on rehearing, the lower court should identify and "dissect" the protected elements from the unprotected elements to prove copying. Then, by focussing on the aspects that are protected, the court was to determine "whether [plaintiff] is likely to prove, under the ordinary observer test, that [defendant's] works are substantially similar to its own."\textsuperscript{80} This language clearly implicates a dissection approach.

The court in \textit{Cooling Systems & Flexibles, Inc. v. Stuart Radiator}\textsuperscript{81} also appeared to use a dissection approach. The case involved infringement of an illustrated radiator catalog.\textsuperscript{82} Plaintiff alleged that an ordinary observer would find the catalogs virtually indistinguishable.\textsuperscript{83} The court responded by observing, "[plaintiff] misses the point. What is important is not whether there is substantial similarity in the total concept and feel of the works . . . but whether the very small amount of protectable expression in [plaintiff's] catalog is substantially similar to the equivalent portions of [defendant's] catalog."\textsuperscript{84} The court clearly rejected the total concept and feel approach, focusing only on the similarity between protectable elements that had been extracted from the whole. Unfortunately, the court never explained how an ordinary observer, who is not to analyze or dissect a work under the test for misappropriation, could focus only on protectable elements.

One possible explanation of the \textit{Cooling Systems} court's dissection approach to misappropriation could be that the work at issue was a catalog—a work containing "facts, numbers, and literal depictions of concrete objects."\textsuperscript{85} In reference to that type of work, the court made an interesting observation: "[C]opyright law considers factual works to be fundamentally different from more artistic works: 'similarity of expression may have to amount to verbatim reproduction or very close para-

\textsuperscript{78} Id. at 607.
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 611.
\textsuperscript{81} 777 F.2d 485 (9th Cir. 1985).
\textsuperscript{82} Id. at 487.
\textsuperscript{83} Id. at 493.
\textsuperscript{84} Id.
\textsuperscript{85} Id. at 491.
phrasing before a factual work will be deemed infringed." The court emphasized that, in the case of a factual work, the range of possible expressions is narrow.

The factual work distinction articulated by the court in *Cooling Systems* also could explain the result in *Concrete Machinery*. The statue of a deer is arguably a visual factual work. Therefore, where it may "make sense to refer to the 'total concept and feel' of a greeting card . . . or anthropomorphic fantasy world," the dissection approach may be more suitable to evaluate other types of works.

IV. DIFFERENT APPROACHES TO DIFFERENT TYPES OF WORKS

This Note theorizes that varying the choice of approach with the type of work at issue may be sensible. The following sections analyze the application of this theory to visual works, musical works, and literary works, and examine whether any general statements about application of the two approaches are possible.

A. Visual Works

This Note discusses above two examples of visual works: the fantasy creatures in *Krofft* and the lawn ornaments in *Concrete Machinery*. These cases are illustrative of the totality approach and the dissection approach, respectively, under the intrinsic test of substantial similarity. A perusal of cases addressing the issue of substantial similarity suggests that inconsistency in approach is common when dealing with nonverbal or visual works.

Although courts use both approaches, the total concept and feel approach seems more common. There are two possible reasons. First,
this approach was adopted by the court in \textit{Krofft}, a case that has been quoted extensively and is binding authority in the Ninth Circuit—a circuit that hears a large proportion of copyright cases.\textsuperscript{91} Second, although the concept is not new that elements in the public domain may be copied without liability,\textsuperscript{92} the 1988 decision in \textit{Concrete Machinery} appears to be the first to articulate coherently a dissection approach when considering visual subject matter.\textsuperscript{93} Earlier courts, even after the 1977 \textit{Krofft} decision, have used the dissection approach without saying so explicitly.\textsuperscript{94} Surprisingly, one of these cases, \textit{Aliotti v. R. Dakin & Co.},\textsuperscript{95} was decided by the Ninth Circuit, the court that decided \textit{Krofft}.

\textit{Aliotti} involved a complaint alleging infringement in the design of stuffed dinosaurs.\textsuperscript{96} Plaintiff had been under contract to create stuffed dinosaurs for a company that went bankrupt. Plaintiff subsequently negotiated with defendant for defendant to take over the marketing of plaintiff's copyrighted designs, including the stuffed dinosaurs.\textsuperscript{97} Defendant did not do so, and instead began developing its own line of stuffed toy dinosaurs. Defendant ultimately offered for sale stuffed dinosaurs of the same six species as those plaintiff had presented.\textsuperscript{98} Although defendant offered evidence of independent creation, the court assumed defendant had appropriated plaintiff’s idea.


\textit{See also} Mistretta v. Curole, 22 U.S.P.Q.2d (BNA) 1707 (E.D. La. 1992). In \textit{Mistretta} the court expressly rejected an approach which would excise the uncopyrightable elements before examining the works for similarities. Instead the court noted that the work as a whole, not each element, was protected by copyright. \textit{Id.} at 1708-09.

91. \textit{Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.}, 562 F.2d 1157, 1166-67 (9th Cir. 1977).
93. \textit{See supra} note 70 and accompanying text.
95. \textit{Id.} at 898 (9th Cir. 1987).
96. \textit{Id.} at 899.
97. \textit{Id.}
98. \textit{Id.} at 900.
In its decision, the court first cited Krofft for the proposition that dissection is not appropriate under the intrinsic test, and that dissection of dissimilarities is inappropriate because it distracts an ordinary observer from the total concept and feel of the work.\(^9\) However, the court went on to state:

To the extent that it is necessary to determine whether similarities result from nonprotectable expression, it is appropriate under Krofft's intrinsic test to perform analytic dissection of similarities. Although even nonprotectable material should be considered when determining if there is substantial similarity of expression, no substantial similarity may be found under the intrinsic test where analytic dissection demonstrates that all similarities in expression arise from the use of common ideas.\(^10\)

By this language the court certainly appeared to mean merely that a defendant will not be held liable to a plaintiff if only unprotected elements of a work are taken. The language used in the opinion is confusing, however, because it is difficult to see a meaningful distinction between "dissection of dissimilarities" (which the court holds as inappropriate under the intrinsic or misappropriate test) and "dissection of similarities" (which, the court states, is appropriate under the intrinsic test). Unfortunately, in at least one case a court already has utilized a dissection test based on this confusing language in Aliotti.\(^11\)

When determining infringement of more creative abstract visual works, such as a fabric design or fantasy-land character, the total concept and feel approach makes sense. In these cases, far more ways of expressing ideas exist, and holding a defendant liable for the similarity of overall impression of these works would be logical.\(^12\) For example, while not much latitude exists for the design of a realistic-looking concrete deer, the same cannot be said of a fabric design with an oriental motif. In addition, allowing any one person copyright in the total concept and feel of "visual" facts, such as natural depictions, arguably would take too much away from other authors or artists. Granting copyright in a natu-
ralistic depiction of a deer would, in a sense, give the artist a monopoly in a work created by nature, not the artist.

B. Musical Works

As demonstrated in the previous section, visual works, particularly works not based on visual "fact," are suited to a totalities approach to misappropriation. However, musical works, for reasons outlined in this section, do not appear suited to a totalities approach, but dissection taken to the extreme would not make sense because individual notes are not copyrightable. Yet, a landmark case of musical infringement, *Arnstein v. Porter*,\(^{103}\) required misappropriation to be determined by "the response of the ordinary lay hearer,"\(^{104}\) in essence utilizing a totalities test. One commentator has offered a possible explanation for this approach:

Musical works, and nonverbal works generally, are less amenable to verbal description than verbal works and, therefore, a "totalities" approach seems more suitable for these creations. Moreover . . . "dissection" analysis of music to determine infringement could be misleading. Alterations, which might sound impressive when described verbally in technical jargon, may not greatly affect how the work reaches the ear.\(^{105}\)

Thus, even if the extrinsic test appears to indicate that a number of similarities exist between two works, the works may not sound alike. If the works don't sound alike, holding a defendant liable for infringement would seem unwise. As Judge Clark opined in his dissent in *Arnstein*, "[O]ne may look to the total impression to repulse the charge of plagiarism where minute 'dissection' might dredge up some points of similarity . . . . [O]ne cannot use a purely theoretical disquisition to supply a tonal resemblance which does not otherwise exist."\(^{106}\)

However, one commentator, Raphael Metzger, believes that a totalities approach to the audience test to music is inadequate.\(^{107}\) Music, in Metzger's mind, does not clearly communicate ideas, as literature and speech do. As he has commented, "Music does not communicate ideas, but engenders impressions among its listeners. Whereas speech and literature communicate ideas which engage the human intellect, music conveys general impressions . . . ."\(^{108}\) Thus, "[b]ecause similarity of idea cannot be considered in musical infringement cases, there is less informa-

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103. 154 F.2d 464 (2d Cir. 1946).
104. Id. at 468.
108. Id. at 68.
tion available in musical than [in] literary plagiarism cases upon which a determination of infringement may be based.”

Metzger has further theorized that the aural sense of the ordinary person is undeveloped, making it difficult for most people to knowledgeably compare two musical compositions. Additionally, visual comparison of musical scores would probably not suffice because only experts can “hear” a composition by reading the score. Therefore, as an alternative approach to the determination of misappropriation, Metzger has proposed use of the La Rue test, which essentially requires dissection of the work—not by individual notes but by composition elements of sound, harmony, melody and rhythm. Unlike the audience test for other works, in musical works experts would present analytical comparisons and assist the trier of fact in aurally ascertaining whether the works are similar. The testimony presumably would include information as to the prevalence of the composition elements at issue in the public domain. For example, a defendant would not be liable for using a rhythm pattern substantially similar to a plaintiff’s if that rhythm pattern is used extensively in musical works. This approach may alleviate the problems inherent in the lay hearer test: untrained ears searching for similarities in probably the least tangible of all the arts.

Some cases seem to delineate the amount of actionable similarity. For example, similarity in accompaniment, even if no similarity exists in the melody, is enough to constitute infringement. Similarity in a musical “motif” may constitute an infringement, and “similarity may arise out of the grouping of notes, similarity of bars, accent, harmony, or melody.” These delineations illustrate that the courts have already uti-
lized a dissection approach much like the La Rue test (though far less technical).

C. Literary Works

Verbal works differ from visual and musical works in that "similarities [in verbal works] can be described in the medium in which they occur, that is, language." An approach such as "total concept and feel" seems less meaningful when precise verbal descriptions of similarity are possible. Yet a dissection approach to a literary work presents the same problem as that approach applied to a musical work: if single words are not copyrightable, at what level do groups of words become copyrightable? Once again, extraction of nonprotectable words from an entire literary work leaves nothing to be protected from infringement. Copyright law was not designed for this result. "It is as though . . . Shakespeare [were to be found] a plagiarist on the basis of his use of articles, pronouns, prepositions and adjectives also used by others." For literary works, then, it may make sense to examine the same sort of dissection approach that has been applied to musical works.

1. Works of Nonfiction

Nonfiction literature runs the gamut from telephone directories to racing forms to datebook organizers to historical accounts. These works contain information not protectable under copyright, either because the work is of a factual nature like telephone directories and historical accounts or because the work falls prey to the merger of idea and expression. Due to those limitations, dissection of the nonprotectable components of these works is necessary to see whether any remain-

Cir. 1983) (action claiming George Harrison’s composition “My Sweet Lord” infringed the song “He’s So Fine,” written by Ronald Mack and recorded by the Chiffons).

119. Abramson, supra note 58, at 148.
121. See supra text accompanying notes 103-18.
126. This phenomenon, called the “merger doctrine,” applies when the unprotectable ideas in a work are inseparable from the work’s expression. In such a case, copyright may not prohibit the use of the expression necessary to convey the idea. See generally Nimmer, supra note 12, § 13.03[B][3], at 13-65 to 13-69. See also Baker v. Selden, 101 U.S. 99 (1879) (case involving a method and special forms for accounting).
ing elements of the work are worthy of protection. As discussed
previously, in a compilation none of the individual facts contained in
the work are protectable. Therefore, a true dissection—elimination of all
noncopyrightable elements from the test—would leave little, if any, pro-
tectable matter. Yet compilations are protectable because of the original-
ity in the overall selection and arrangement of facts.

Despite the confusion in determining substantial similarity of other
types of works, courts generally approach non-fiction literature quite log-
ically. Courts recognize that certain elements of these works are not en-
titled to protection and discount these elements from the substantial
similarity calculus. Although there has been confusion in the past over
the “sweat of the brow” approach to protecting compilations and factual
works, the Supreme Court decision in Feist put that issue to rest,
allowing no protection beyond that allowed by the copyright statute re-
gardless of the amount of labor expended in research. The Feist Court
stressed further the importance of the selection, coordination, and ar-
rangement of data, as opposed to the copyrightability of individual facts.
In this way, Feist supports a dissection approach similar to that proposed
for “factual” visual works.

The Feist decision is sensible. As with factual visual works, the
number of possible ways to express an idea is limited in nonfiction works,
whether considering the white pages of a phone book or an historical
account of Lincoln’s assassination. A useful example might be commis-
sioning ten people to independently compile telephone directories. How
different could the resulting works be? In contrast, a request to write a
fictional “boy meets girl” story undoubtedly would produce ten very dif-
ferent works. The latitude of expression is far greater for the fictional
work because the authors need not work within a confined set of facts.
Therefore, granting copyright to one author for anything but the selec-
tion and arrangement of facts in a nonfiction work arguably would take
too much away from other authors. Granting copyright in such a situa-
tion, regardless of the brow sweat expended, would be akin to granting a

127. See supra text accompanying note 59.
129. See Miller v. Universal City Studios, Inc., 650 F.2d 1365 (5th Cir. 1981); Eisenschiml v.
Fawcett Publications, Inc., 246 F.2d 598 (7th Cir.), cert. denied, 355 U.S. 907 (1957); Leon v. Pacific
Tel. & Tel. Co., 91 F.2d 484 (9th Cir. 1937); Triangle Publications, Inc. v. New England Newspaper
Collections of Facts: A Theory for the Protection of Nonfiction Literary Works, 81 COLUM. L. REV.
131. Id. at 1291.
132. See supra text accompanying notes 102-03.
seventy-five year monopoly on facts, and "would severely limit the ability of later authors to build upon their predecessors' contributions." 133

2. Works of Fiction

Conceptually, few would argue that courts should approach fictional works in the same manner as nonfiction works to determine substantial similarity. Clearly with fictional works, defendants are liable when complete literal similarity is found. That makes sense under both approaches, because the word-for-word dissection would be the same and the total concept and feel of the works and their expression also would be the same.

A total concept and feel approach to literature presents problems, however, because the plot (depending on how generally it is described) 134 or gist of an entire work is no doubt in the public domain. 135 For the same reason that facts are not copyrightable, neither are plots. For example, to allow one author to have a monopoly on "boy meets girl, boy loses girl, boy gets girl back," would take too much away from other authors. Yet the total concept and feel of a literary work is probably best described by a recitation of the plot.

Additionally, a total concept and feel approach does not adequately address the issue of partial literal similarity. 136 For instance, a defendant is liable for closely paraphrasing a work 137 or for taking even a quantitatively small literal portion of a work if the similar material is qualitatively important. 138 Yet in the latter case, the copying may not be enough to make similar the total concept and feel of the works. Though courts do not usually find infringement on the basis of similarity of a single sentence, Judge Jerome Frank once stated that, though quantitatively small,

133. Denicola, supra note 129, at 525.
134. See, e.g., Sheldon v. Metro-Goldwyn Pictures Co., 81 F.2d 49 (2d Cir. 1936) (lengthy comparison between the plots of defendant's movie and plaintiff's play).
the copying of the lines "Euclid alone has looked on Beauty bare," or "Twas brillig and the slithy toves," could constitute an infringement. One can imagine, however, that the aforementioned infringing sentences could be included in a work without changing its total concept and feel.

In Nichols v. Universal Pictures Corp. the Second Circuit addressed the issue of substantial similarity. Nichols concerned the alleged infringement of plaintiff's play "Abie's Irish Rose" by defendant's motion picture "The Cohens and the Kellys." Both works involved a quarrel between a Jewish and an Irish father, the marriage of their children, the birth of grandchildren, and a reconciliation. At trial, an expert witness attempted to show infringement by use of a complicated algebraic formula. The lower court judge rejected any dissection of the works. But on appeal, Judge Learned Hand suggested a sort of dissection approach:

Upon any work and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times consist of only its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.

Hand's abstractions test helpfully expresses the real difficulty in determining whether a work is worthy of copyright protection: finding the level of the work appropriate for dissection and comparison.

Other courts have basically used Hand's formulation in Nichols, comparing plot, sequence of events, etc., in combination with an evaluation of the total concept and feel of the work. Courts have utilized the abstractions test also to determine copying under the extrinsic test, using the total concept and feel approach to determine misappropriation. For example, in Reyher v. Children's Television Workshop, the court found that both plaintiff's and defendant's work presented an identical sequence of events, but that the sequence was in the public domain.

139. Heim v. Universal Pictures Corp., 154 F.2d 480, 487 n.8 (2d Cir. 1946).
140. 45 F.2d 119 (2d Cir. 1930), cert. denied, 282 U.S. 902 (1931).
141. Id.
143. Id. at 147-48.
144. Nichols, 45 F.2d at 121.
145. See Berkic v. Crichton, 761 F.2d 1289, 1293 (9th Cir.) (infringement of plaintiff's work "reincarnation" by novel and movie "Coma"), cert. denied, 474 U.S. 826 (1985).
146. 533 F.2d 87 (2d Cir.), cert. denied, 429 U.S. 980 (1976).
147. Id. at 89.
The court went on to examine the "total concept and feel" of the works, but in doing so actually dissected the story, comparing specific components such as characters, locale, choice of illustrations, and dialogue.149

The case of Litchfield v. Spielberg150 involved a plaintiff claiming that Steven Spielberg's blockbuster movie "E.T." infringed her musical play "Lokey from Maldemar." The court in Litchfield proceeded the same way as did the Reyher court, examining the sequence of events, mood, and dialogue to determine copying and citing Kroff's total concept and feel approach to determine misappropriation. Yet here, the court stated that the difference in overall themes of the works showed that the total concept and feel was not the same.151 Though both courts refer to their approach to misappropriation as total concept and feel, the Reyher court actually was utilizing a dissection approach.152

148. Id. at 91-92 (quoting Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970)).
149. Id. at 92-93. In this case, the court held that there was no infringement by the defendant.
150. 736 F.2d 1352 (9th Cir. 1984), cert. denied, 470 U.S. 1052 (1985).
151. Id. at 1357 ("Whereas E.T. concentrates on the development of the characters and the relationship between a boy and an extra-terrestrial, Lokey uses the caricatures to develop its theme of mankind divided by fear and hate.").
152. In Shaw v. Lindheim, 919 F.2d 1353 (9th Cir. 1990), the Ninth Circuit has recently reinterpreted infringement analysis under Kroff, at least as the analysis should be applied to literary works. Kroff defined the extrinsic test as a measure for the similarity of ideas, and the intrinsic test as a measure of the similarity of expression. Kroff, 562 F.2d at 1164. The court in Shaw, however, saw both tests as analyses of expression: the extrinsic test to be determined by objective criteria; the intrinsic test to be determined subjectively by the trier of fact. Shaw, 919 F.2d at 1356-57.

The district court in Shaw had held previously that there was no substantial similarity between two works, both involving television series called The Equalizer, and had granted summary judgment to the defendants. The summary judgment was reversed on appeal.

The circuit court reasoned that, whereas Kroff listed three or four discrete criteria for consideration under the extrinsic test of substantial similarity, recent cases listed "plot, themes, dialogue, mood, setting, pace, and sequence" as extrinsic test criteria. Id. (quoting Jason v. Fonda, 526 F. Supp. 774, 777 (C.D. Cal. 1981), aff'd and incorporated by reference, 698 F.2d 966 (9th Cir. 1982)). The court continued:

Now that [the extrinsic test] includes virtually every element that may be considered concrete in a literary work, the extrinsic test as applied to books, scripts, plays, and motion pictures can no longer be seen as a test for mere similarity of ideas. 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 Kroff's division between expression and ideas. Indeed, a judicial determination under the intrinsic test is now virtually devoid of analysis, for the intrinsic test has become a more subjective judgment as to whether two literary works are or are not similar.

Id. at 1357 (citations omitted). As far as the summary judgment was concerned, the court held that because objective elements such as plot, mood, etc. are embodied in the extrinsic test, it is improper for a court to find that there is no substantial similarity as a matter of law "based only on a subjective assessment of 'concept and feel' of two works of literature—a task no more suitable for a judge than for a jury," when similarity was found under the extrinsic test. Id. at 1360.

Two Ninth Circuit cases have cited Aliotti as authority for applying the dissection approach to fictional works. In Olson v. National Broadcasting Co.\textsuperscript{153} plaintiff claimed NBC's television series "The A-Team" infringed his copyright to a screenplay. The court first compared plot, theme, dialogue, mood, setting, pace, and sequence of events under the extrinsic test,\textsuperscript{154} and determined that no substantial similarity existed between the works. The court went on to state that no substantial similarity existed under the intrinsic test either because, while a "reasonable jury might have found substantial similarity in the total concept and feel of the works[,] . . . no substantial similarity may be found under the intrinsic test where analytic dissection demonstrates that all similarities in expression arise from the use of common ideas."\textsuperscript{155}

 Olson was like Aliotti in that defendant didn't take anything copyrightable from plaintiff's work. Therefore, the court did not need to resolve the issue of misappropriation. But the court could have looked at the works in these cases the same way as the court in Roulo viewed the greeting cards:\textsuperscript{156} that works are protectable due to the original selection and arrangement of nonprotectable elements. In failing to look at selection and arrangement, the Olson court explicitly rejected the total concept and feel approach.

 In Trust Company Bank v. Putnam Publishing Group Inc.\textsuperscript{157} plaintiffs brought suit to enjoin distribution of defendant's novel "The Blue Bicycle," claiming that it infringed the novel "Gone With the Wind," to which they held the copyright. Again, the court compared theme, plot, etc. in the extrinsic test. With respect to the intrinsic test, Trust Co. cited Aliotti for the following proposition:

 Nonprotectible [sic] matters in the works, such as ideas, facts and scenes-a-faire, must be excised before comparing the works as a whole to judge their total concept and feel . . . . As applied to dramatic works, the total concept and feel test can also be described as whether the ordinary lay observer or audience would immediately recognize a defendant's movie or book as the "picturization" or "dramatization" of the plaintiff's book.\textsuperscript{158}

 Trust Co. states two approaches to total concept and feel: a true totality approach and a dissection approach requiring excision of nonprotectable elements before comparison.

\textsuperscript{153} 855 F.2d 1446 (9th Cir. 1988).
\textsuperscript{154} Id. at 1450-52.
\textsuperscript{155} Id. at 1453 (quoting Aliotti v. R. Dakin & Co., 831 F.2d 898, 901 (9th Cir. 1987)).
\textsuperscript{156} See supra text accompanying notes 60-66.
\textsuperscript{157} 5 U.S.P.Q.2d (BNA) 1874 (C.D. Cal. 1988).
\textsuperscript{158} Id. at 1878 (quoting Aliotti v. R. Dakin & Co., 831 F.2d 898, 901 (9th Cir. 1987); Berkic v. Crichton, 761 F.2d 1289, 1292 (9th Cir.), cert. denied, 474 U.S. 826 (1985)).
Trust Co. cites Aliotti as authority for the use of the dissection approach, but the Trust Co. restatement of that approach is clearly a misreading of Aliotti. The Aliotti court did not instruct the trier of fact to excise copyrightable elements from works and then to evaluate the total concept and feel of what remained. Rather, the Aliotti court found that no substantial similarity of the works could exist if the only similarities between them arose from nonprotectable elements. Dicta from Aliotti implies that, had the court reached the misappropriation test, it would have applied a total concept and feel analysis.

To a certain extent, whether courts take a total concept and feel or dissection approach doesn’t really matter. Application of either approach seemingly ends up in the same place. Dissection makes sense when not taken to the extreme of extracting each single word from consideration. Specifically, literary dissection should allow a trier of fact to compare components of the work, such as plot, theme, dialogue, mood, and setting, the way a comparison of a musical work would consider sound, harmony, melody, rhythm, and accompaniment. If the trier of fact finds that only Judge Hand’s “general patterns” are similar, then no liability should result under the test for misappropriation. As was illustrated in Reyher, even when a court purports to apply a total concept and feel approach, the court looks beyond the nonprotectable plot (overall feel of the works) and compares specific components. Thus, most courts appear to apply the same sort of analysis despite the cases cited and language used in their opinions.

D. Application of Principles in General

For all the analysis and comparison of cases, general principles are not easily articulated. Utilizing a true dissection test for any type of work does not seem to make sense. Individual musical notes or words are not copyrightable. Nor are most individual visual features (a cummerbund itself is not protectable, but a cummerbund worn by a human-sized hamburger no doubt is). On the other hand, the application of an overly simplistic total concept and feel approach may result in finding infringement more often than is warranted.

The best approach is a modified dissection. Such an approach ex-

160. Id.
161. See supra text accompanying notes 145-49.
162. Although in Turner v. Century House Publishing Co., 290 N.Y.S.2d 637, 646 (1968), the court really missed the boat by holding that copying of an entire chapter of a book did not constitute infringement.
APPROACHES TO THE MISAPPROPRIATION TEST

amines different components of individual works, with the level of dissection varying based on the type of work examined. Imagine a spectrum with complete dissection on one end and total concept and feel on the other. For visual factual works and works of nonfiction, dissection should be thorough, protecting only original features. Extending protection too far for such works would take too much away from the public domain. In contrast, musical works, works of fiction, and non-naturalistic visual works should be judged with an approach more like total concept and feel. These types of works allow for much latitude in expression, and if two such works are very similar, the reason is not lack of choice in expression.

For the most part, courts appear to get it right despite the various nomenclature they employ. The courts tend to treat works of nonfiction and "factual visual works" similarly, by being more vigorous in the dissection analysis and being less likely to extend protection to those works. Of the cases researched for this Note, only those involving non-fiction and "factual visual works" took a dissection approach, with the exception of one fictional work and one borderline naturalistic/fantasy work. The fictional works and works not based on realistic representations used a dissection approach, which leaned toward total concept and feel, with the exception of one borderline "factual" visual work. Even


the cases seemingly misled by Aliotti or Concrete Machinery utilized the total concept and feel approach appropriate for fictional and creative works not constrained by naturalistic limitations. \(166\)

V. CONCLUSION

The courts are split as to whether they cite a total concept and feel approach or a dissection approach in their determination of misappropriation. Complete dissection never seems to be used. Doing so would lead to the absurd result of not having anything left of the work to protect. Overall, two broad approaches, using a less basic level of dissection, are employed. When assessing works that are either compilations, works of nonfiction, or visual works depicting realistic subjects, a stricter dissection is used. A more relaxed dissection approach, nearing total concept and feel, is used to evaluate works of fiction, fabric designs, and works with room for much latitude of expression. However, Professor Nimmer has suggested that the Supreme Court’s decision in Feist dictates application of a dissection approach for all works. \(167\)

In Feist, the Court eliminated all material not subject to copyright from the substantial similarity determination. As a result, it appeared that defendant had taken only uncopyrightable material from plaintiff. The result is rational and in accordance with copyright law. Professor Nimmer takes this reasoning a step further, however, stating:

In the wake of Feist, [dissection] should be considered not only of factual compilations and computer programs, but across the gamut of copyright law: to determine whether the similarity between plaintiff’s and defendant’s work is substantial, the comparison should not include unoriginal elements of plaintiff’s work; rather, the comparison should take place after filtering out of the analysis elements of plaintiff’s work that are not protectable. \(168\)

The problem with Professor Nimmer’s observation is that Feist was decided on narrow grounds. The Court found that defendant had not taken any protectable material from plaintiff. \(169\) This Note addresses the
situation in which a defendant takes both protectable and nonprotectable elements from a plaintiff's work. Whether the narrow holding in *Feist* would apply to such cases is not yet clear.

On the other hand, substantial similarity is a creature of confusion. If a treatise as illustrious as *Nimmer on Copyright* entertains the possibility that the holding in *Feist* will impact the misappropriation issue, such impact is certainly possible. As a result, the courts will move from quoting *Krofft* as authority for the total concept and feel approach to quoting *Feist* as authority for the dissection approach. In any event, the courts will no doubt continue to take the same, rational approach taken now.