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# Total Concept and Feel: A Proper Test for Children's Books

Andrew C.S. Efaw\*

*There is nothing new under the sun.*<sup>1</sup>

## I. INTRODUCTION

Amy is an aspiring children's book<sup>2</sup> author and has recently completed a 1,000 word picture book manuscript,<sup>3</sup> entitled *Fritzi and the Blind Man*. The story, based upon an actual childhood experience of her grandfather,<sup>4</sup> is about six year old Fritzi. On his way to school in

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\* B.S., United States Military Academy 1989; J.D., University of Pennsylvania 1997. Thanks to Professor Robert A. Gorman of the University of Pennsylvania for his insight and direction during the nascent stages of this paper. Special thanks to wife, Amy, who inspired this paper and is soon to have her first children's book published. Finally, thanks be to God, the only true creator of original works of authorship.

<sup>1</sup> *Ecclesiastes* 1:9 (New American Standard).

<sup>2</sup> See CONNIE C. EPSTEIN, *THE ART OF WRITING FOR CHILDREN* 1-14 (1991) (detailing the history of children's literature from the Latin *Orbis Pictus* in 1657 to the present).

<sup>3</sup> Most picture books contain between 200 and 1,000 words. See Celia Berridge, *Picture Books*, in *HOW TO WRITE AND ILLUSTRATE CHILDREN'S BOOKS AND GET THEM PUBLISHED* 54, 59 (Trelde Pelkey Bricknell & Felicity Trotman eds., 1988). See generally 1997 *CHILDREN'S WRITER'S & ILLUSTRATOR'S MARKET* (Alice P. Beuning ed., 1997) (stating that the majority of picture books contain about 1,000 words).

<sup>4</sup> Ninety percent of all authors base their first book published "on actual personal experience." ROBERT C. MERIDETH & JOHN D. FITZGERALD, *STRUCTURING YOUR NOVEL* 1 (1993).

1917 Vienna, Fritzi daily walks past the same street beggars and is fascinated by a particular violin-playing, blind beggar. The blind man blesses anyone who he hear putting coins in his cup. Fritzi wants to be blessed but does not have any coins, so he fools the beggar by tossing a button rather than a coin into the cup. In the end, Fritzi realizes that even innocent pranks can hurt another person.

Amy sends the manuscript to a publisher<sup>5</sup> without a copyright notice, without depositing a copy with the Library of Congress and without registering the work with the Copyright Office.<sup>6</sup> When the work arrives at the publishing company, Andy, a junior editor, picks Amy's manuscript out of the "slush pile" and reads it.<sup>7</sup> Thereafter, Andy re-

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<sup>5</sup> Note that Amy sends her manuscript directly to the publishing company. She does not have an agent. "[T]he ratio of acceptances to rejections is something on the order of one in ten thousand" when authors submit "unagented" material to publishing companies. RICHARD CURTIS, *HOW TO BE YOUR OWN LITERARY AGENT* 10 (1996).

<sup>6</sup> Though beginning authors are occasionally worried that their work will be stolen, they commonly submit work without copyright formalities. See EPSTEIN, *supra* note 2, at 101. Apparently new authors ignore copyright formalities because they are wary of doing something that will hinder their works from being published. See 1997 CHILDREN'S WRITER'S & ILLUSTRATOR'S MARKET, *supra* note 3, at 13 (explaining that some industry experts feel that "a copyright notice will only confuse publishers about whether the material is registered (acquiring rights to previously registered material is a more complicated process)"); Elaine Marie Alphin, *Copyright: To Register or Not?*, CHILDREN'S WRITER (Inst. of Children's Literature, West Redding, Conn.), Dec. 1995, at 5 (arguing that registration can "send the message that you don't trust the editor"). Normally, the publisher will take care of the formalities once the copyright is sold. See *id.*; 1997 CHILDREN'S WRITER'S & ILLUSTRATOR'S MARKET, *supra* note 3, at 13 ("It is a publisher's responsibility to register your book for copyright.").

<sup>7</sup> Junior editors act as the first reader in the publishing company bureaucracy, sifting through the mounds of unsolicited manuscripts, and make the initial determination of whether or not a manuscript is publishable. See BERTHE AMOSST & ERIC SUBEN, *WRITING AND ILLUSTRATING CHILDREN'S BOOKS FOR PUBLICATION* 84-85 (1995) (stating that junior editors are usually young, college educated and that reading manuscripts is only one of many of their responsibilities); CURTIS, *supra* note 5, at 10; OLGA LITOWINSKY, *WRITING AND PUBLISHING BOOKS FOR CHILDREN IN THE 1990'S* 5-6 (1992) (noting that the junior editor logs the manuscripts by date, title and author before reading them). Most of these are poorly written and rejected by the junior editor. *Id.* at 27. Some companies do not even read these manuscripts but return them with a form letter. CURTIS, *supra* note 5, at 10 ("[I]t is clearly cost-

turns the manuscript, informing Amy that the publishing company does not find her work suitable for their list.<sup>8</sup>

Andy, however, truly likes the story and thinks it will sell. He goes home, rewrites the story as best as he can from memory. He changes the name of the main character to Franz and sets the story in turn of the century Berlin, but in every other way he tries to recreate Amy's story's ambience and charm. Upon finishing the story, Andy sells it as his own to his employer publishing company under the title, *Franz and the Button*.<sup>9</sup>

ineffective to retain editors to read 'unagented' manuscripts . . .").

Manuscripts sent to publishers directly by authors, without the benefit of an agent, are called "slush" and are put on the so-called "slush pile" of unagented manuscripts. *Id.* ("Manuscripts submitted to publisher by unrepresented authors are described by the depressing term *slush* . . ."); *see also* AMOSST & SUBEN, *supra*, at 84-85 (discussing "slush piles"); LITOWINSKY, *supra*, at 4-5 (discussing "slush piles").

<sup>8</sup> *See, e.g.*, Letter from HarperCollins Publishers (May 16, 1996), to Amy Efaw ("[W]hile we wish we had good news, we're afraid we do not feel it is right for our list."), Letter from Viking Children's Books to Amy Efaw ("[W]e regret to say that it is not right for us."); Letter from Alfred A. Knopf to Amy Efaw ("[W]e . . . regret to say it is not right for our list."); Letter from Houghton Mifflin Company to Amy Efaw ("[W]e do not believe we could publish it successfully."); Letter from Henry Holt and Company, Inc. to Amy Efaw ("[W]e do not feel it is suitable for our list.") (all letters are on file with the author); *see also* AMOSS & SUBEN, *supra* note 7, at 92-93 (showing actual examples of rejection letters); LITOWINSKY, *supra* note 7, at 6 (noting that publishing companies often reject manuscripts with the catch-all phrase, "because they're not right for the list.").

<sup>9</sup> This scenario is realistic because of the large volume of manuscripts received. *See* CURTIS, *supra* note 5, at 11 (making the conservative estimate that the average publishing company receives five thousand unsolicited manuscripts per year); LITOWINSKY, *supra* note 7, at 5 ("[T]he average publishing house receives three to five thousand manuscripts a year."). Thus, publishers cannot possibly manage to check each manuscript's originality and, therefore, have no formal checks in place. *See* Telephone Interview with Clay Winters, President, Boyds Mills Press (Boyds Mills, a subsidiary of Highlights Corporation, publishes various children's books.), Former President, Putnam/Grosset Books for Young Readers (Putnam is one of America's largest and oldest publishers of children's books.) (Mar. 19, 1997) [hereinafter Winters].

However rare it may be for a junior editor to steal a story, they clearly have a monetary motive. *See* CURTIS, *supra* note 5, at 11 (stating that the average junior

Eighteen months later,<sup>10</sup> Amy is browsing in the children's section of her local bookstore and comes across Andy's version of her story.<sup>11</sup> Does Amy have a favorable federal case against Andy for the copyright infringement of her story?<sup>12</sup>

## II. THE STATUTE

According to the Copyright Act of 1976, original literary works fixed in a tangible form are protected.<sup>13</sup> Fortunately, neither Amy's failure to affix a copyright notice to her manuscript,<sup>14</sup> nor her failure to

editor only makes about twenty thousand dollars a year).

<sup>10</sup> See 1997 CHILDREN'S WRITER'S & ILLUSTRATOR'S MARKET, *supra* note 3, at 43-151 (showing that the children's book companies publish one to three years after acceptance of a manuscript).

<sup>11</sup> A fact pattern very similar to this hypothetical actually occurred in *Smith v. Little, Brown, & Co.*, 245 F. Supp. 451 (S.D.N.Y. 1965), *aff'd*, 360 F.2d 928 (2d Cir. 1966).

In that case, the head of the Juvenile Division at Little Brown, together with an author friend, illicitly copied and published another author's manuscript that had previously been rejected by Little Brown. *Id.* See discussion *infra* part II.C. See also EPSTEIN, *supra* note 2, at 102 (arguing that "an established company can be expected to handle literary work submitted to it in good faith, making the danger of theft slight."); Sandra Torrey, *Fact Fiction and Fairness: The Copyright Wars Surge*, WASH. POST, June 19, 1995, at F07 (quoting New York lawyer Carl Person who insists that this is a common practice at least in the Hollywood screenplay submission process, if not with book publishers).

<sup>12</sup> In this paper, Amy's hypothetical case against Andy will be referred to as *Andy v. Amy*.

<sup>13</sup> The Copyright Act of 1976, 17 U.S.C. § 102(a)(1).

Copyright protection subsists, in accordance with this title, in 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 machine or device. Works of authorship include the following categories: (1) literary works . . .

*Id.*

<sup>14</sup> Notice is not a prerequisite for copyright protection. *Id.* § 401(a) ("Whenever a work protected under this title is published . . . a notice of copyright as provided by this section *may* be placed on publicly distributed copies . . .") (emphasis added). Prior to the 1976 Act, "[f]ederal copyright arose upon publication with notice; if no

deposit a copy of her story with the Library of Congress,<sup>15</sup> nor her failure to register her work affect her copyright protection.<sup>16</sup> Even without these formalities, Amy possesses a valid copyright<sup>17</sup> and, therefore, has the exclusive right to reproduce and distribute copies of *Fritzi and the Blind Man*.<sup>18</sup> By demonstrating that she owns a valid

notice, work fell into public domain.” ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT FOR THE NINETIES 388 (4th ed. 1993).

If a notice appears on the copies, it shall consist of the following three elements: (1) the symbol © (the letter C in a circle), or the word “Copyright”, or the abbreviation “Copr.”; and (2) the year of the first publication of the work . . . ; and (3) the name of the owner of copyright in the work . . . .”

17 U.S.C. § 401(b)

<sup>15</sup> 17 U.S.C. § 407(a)

The owner of copyright or of the exclusive right of publication in a work published in the United States shall deposit, within three months after the date of such publication – (1) two complete copies of the best edition . . . . [T]he deposit requirements of this subsection . . . are [not] conditions of copyright protection.

*Id.*

<sup>16</sup> 17 U.S.C. § 201(a) (“Copyright in a work protected under this title vests initially in the author or authors of the work.”).

<sup>17</sup> 17 U.S.C. § 408(a).

At any time . . . the owner of copyright . . . may obtain registration of the copyright . . . by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708. Such registration is not a condition of copyright protection.

*Id.* See generally GORMAN & GINSBURG, *supra* note 14, at 384-89. However, note that though registration is optional, it is a prerequisite to filing suit. 17 U.S.C. § 411(b) (“[N]o action for infringement of the copyright in any work shall be instituted until the registration . . . has been made . . . .”).

<sup>18</sup> 17 U.S.C. § 106(1).

[T]he owner of a copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership . . . .

*Id.*

copyright of her picture book<sup>19</sup> and alleging that Andy copied constituent elements unique to her story,<sup>20</sup> Amy has a *prima facie* case against Andy.<sup>21</sup>

However, when faced with a lawsuit, Andy is likely to claim that he never copied any of Amy's expression. He will claim that *Franz and the Button* and *Fritzi and the Blind Man* share some of the same ideas but do not have any common copyrightable expression. Since the Copyright Act protects original works but does not "extend to any idea,"<sup>22</sup> Amy must prove that Andy's story actually copied protected expression. Thus, the Copyright Act itself provides Amy with no in-

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<sup>19</sup> Amy can prove original authorship despite her lack of formalities. For instance, she may have witnesses that read the story before she sent it to Andy, she may have an electronic date stamped record of her story on her computer, or she may have Andy's rejection letter and returned manuscript. Any variation of the above evidence would tend to show that she was the originator of the story. However, Clay Winters of Boyds Mills Press claims that the only foolproof way to prove original authorship is for the author to mail a copy of the manuscript to herself prior to submitting it to a publishing company. See Winters, *supra* note 9. The unopened, dated copy would provide strong evidence of original authorship. *Id.*

<sup>20</sup> See Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991). In *Feist*, the Supreme Court established that "[t]he mere fact that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the sine qua non of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author." *Id.* at 348.

<sup>21</sup> Amy undoubtedly has a valid cause of action against the publishing company too, but publishers often protect themselves by requiring authors to guarantee in their contract that their work is "new and original." See CURTIS, *supra* note 5, at 82 ("[M]ost [publishers] place the responsibility for their protection from lawsuits squarely on the shoulders of authors."); MARK L. LEVINE, NEGOTIATING A BOOK CONTRACT 16 (defining indemnification in a standard book contract as requiring an author to "reimburse the publisher for its losses and expenses if a representation or warranty made by [the author] is wrong and the publisher is sued or loses money as a result"). See also Winters, *supra* note 9.

<sup>22</sup> 17 U.S.C. § 102(b). See also H.R. REP. NO. 94-1476, at 56-57 (1976) ("Copyright does not preclude others from using the ideas or information revealed by the author's work.").

"No author may copyright facts or ideas. The copyright is limited to those aspects of the work—termed 'expression'—that display the stamp of the author's originality." Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 547 (1985). This principle is known as the idea/expression dichotomy. *Feist*, 499 U.S. at 350. See also PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 19 (1994).

dication of her chances for victory over Andy and only serves as a springboard into the sea of existing case law. Only by examining past judicial interpretation of the Copyright Act can Amy determine her chances of prevailing against Andy.

### III. CASE LAW

#### A. *The Early Cases*

Historically, the boundary line between taking mere ideas and copying expression has been far from clear. In the seminal case of *Nichols v. Universal Pictures Corp.*,<sup>23</sup> Judge Learned Hand discussed what constitutes a non-infringing taking. In *Nichols*, the plaintiff alleged that the defendant had stolen his play, "Abie's Irish Rose,"<sup>24</sup> by writing and producing "The Cohen's and the Kelly's." Both plays revolved around the conflict that arises when the child of a Jewish family and the child of an Irish Catholic family intermarry.<sup>25</sup> Judge Hand held that the plays were similar, but too unlike to constitute infringement.<sup>26</sup> He asserted that the plot of any work can be described in terms "of increasing generality . . . as more and more of the incident is left out."<sup>27</sup> However, on that continuum from exact copying to general idea, a blurred line exists, beyond which protection is no longer extended.<sup>28</sup> "Nobody has ever been able to fix that boundary, and nobody ever can."<sup>29</sup>

Judge Hand's prophecy held true six years later in the much-celebrated case, *Sheldon v. Metro-Goldwyn Pictures Corp.*<sup>30</sup> In *Sheldon* Judge Hand ruled that Metro-Goldwyn infringed upon Sheldon's copyright of his play<sup>31</sup> when the studio produced a movie

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<sup>23</sup> 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

<sup>24</sup> *Id.* at 120.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 121.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> 81 F.2d 49 (2d Cir. 1936), *cert. denied*, 298 U.S. 669 (1936), 106 F.2d 45 (2d Cir. 1939), *aff'd*, 309 U.S. 390 (1940) (damages).

<sup>31</sup> Sheldon produced a play based on the story of the Scotch girl, Madeleine



about the same historical incident.<sup>32</sup> Though none of the actual dialogue was copied, Judge Hand explained that words, gestures, scenery and costumes are among the factors that bind a play “together in an inseparable unity” and render it able to be copyrighted.<sup>33</sup> Furthermore, Metro-Goldwyn was not let off the hook for incorporating only parts of the plaintiff’s work because “no plagiarist can excuse the wrong by showing how much of his work he did not pirate.”<sup>34</sup>

Even though these two early cases are often quoted for the above propositions, they seem to do very little in helping Amy form a case. Judge Hand never expressly addresses the difference between the two cases. Important to Amy’s case, however, is that *Sheldon* does show that in order to be guilty of a copyright violation, Andy need not have copied Amy’s words verbatim. Nevertheless, questions remain: How much is too much? How much or what must Andy have taken to infringe Amy’s copyright?

## B. *The Test*

### 1. *Arnstein*

The test for copyright infringement became more clear when Judge Frank decided the 1946 case of *Arnstein v. Porter*<sup>35</sup> against the backdrop of the early Judge Hand cases.<sup>36</sup> In *Arnstein*, Judge Frank set up the definitive test to determine when copyright infringement has oc-

Smith, who was brought to trial in 1857 for the attempted murder and murder of her lover by poisoning. *Id.* at 49. The prosecution, however, was unable to prove her guilt. *Id.* The case was closely followed in Scotland and England, and became “cause celebre” even into the twentieth century. *Id.*

<sup>32</sup> *Id.* at 56. Judge Hand said that two questions must be answered to determine whether a copyright infringement has occurred: 1) Did the defendants use the plaintiff’s work to produce their own? 2) If so, was the use an infringing use? *Id.* at 54.

<sup>33</sup> *Id.* at 55-56.

<sup>34</sup> *Id.* at 56.

<sup>35</sup> 154 F.2d 464 (2d Cir. 1946), *cert. denied*, 330 U.S. 851 (1947).

<sup>36</sup> See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936), *cert. denied*, 298 U.S. 669 (1936), 106 F.2d 45 (2d Cir. 1939), *aff’d*, 309 U.S. 390 (1940) (damages). See also discussion part II.A.

curred.<sup>37</sup> First, after the plaintiff establishes that he is the owner of a valid copyright, he must then show that the defendant copied the copyrighted work.<sup>38</sup> The defendant may admit the copying, or the copying can be inferred,<sup>39</sup> either by showing circumstantial evidence of access or by showing probative similarity. Experts are regularly asked to testify regarding the probative similarity between two works.<sup>40</sup> Next, the plaintiff must show that the defendant's work is substantially similar to the plaintiff's work.<sup>41</sup> In this second portion of the inquiry, experts are inappropriate,<sup>42</sup> instead, substantial similarity is determined by an ordinary or lay audience.<sup>43</sup> However, the lay jury must understand that the substantial similarity inquiry only applies to similarity of expression, not to facts or ideas.<sup>44</sup> This substantial similarity inquiry can be satisfied either by showing the requisite quantity of the copying<sup>45</sup> or quality of the copying.<sup>46</sup>

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<sup>37</sup> See generally 2 PAUL GOLDSTEIN, COPYRIGHT PRINCIPLES, LAW AND PRACTICE § 7 (1989); GORMAN & GINSBURG, *supra* note 14, at 404; Michael L. Sharb, Comment, *Getting A "Total Concept and Feel" of Copyright Infringement*, 64 U. COLO. L. REV. 903, 908-09 (1993).

<sup>38</sup> See GOLDSTEIN, *supra* note 37, at § 7; GORMAN & GINSBURG, *supra* note 14, at 404; Sharb, *supra* note 37, at 908-09.

<sup>39</sup> See GORMAN & GINSBURG, *supra* note 14, at 404.

<sup>40</sup> See *id.*

<sup>41</sup> See GOLDSTEIN, *supra* note 37, at § 7.

<sup>42</sup> See *id.*

<sup>43</sup> See GORMAN & GINSBURG, *supra* note 14, at 404.

<sup>44</sup> See *id.*

<sup>45</sup> See *id.*

<sup>46</sup> See GOLDSTEIN, *supra* note 37; GORMAN & GINSBURG, *supra* note 14, at 404; Sharb, *supra* note 37, at 908-09.

The Second Circuit continues to use the *Arnstein* test today, but in an abbreviated form. The recent case, *Twin Peaks Prods., Inc. v. Publications Int'l, Ltd.*, illustrates the change. 996 F.2d 1366 (2d Cir. 1993). See generally *Publication of Show's Plot Not Fair Use*, MEALEY'S LITIG. REPS.: INTELL. PROP., June 25, 1993; *Abridgement Must Be Transformative Use In Order To Qualify For Fair Use Defense*, PAT., TRADEMARK & COPYRIGHT J., June 17, 1993, at 158. The Second Circuit held that after access is proven, it is appropriate to skip the question of probative similarity, going directly to the question of substantial similarity: "Since a showing of substantial similarity will necessarily include the lesser showing of probative similarity, there seems little harm in combining the copying and infringement inquiries. . . ." *Id.* at 1372 n.1 (citing *Warner Bros., Inc. v. American Broadcasting Companies, Inc.*, 720 F.2d 231, 239-43 (2d Cir. 1983)). But see MELVILLE B.

## 2. *Krofft*: A Second Test?

Seemingly, circuit courts also use a second test, the extrinsic-intrinsic test, first introduced by the Ninth Circuit in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*<sup>47</sup> Under the extrinsic-intrinsic test, the plaintiff must first demonstrate that he is the owner of a valid copyright<sup>48</sup> and that the defendant had access to the work.<sup>49</sup> Once these prerequisites have been satisfied, the extrinsic test is applied to determine if any ideas have been taken.<sup>50</sup> Here, the factfinder uses "specific criteria which can be listed and analyzed."<sup>51</sup> Ap-

NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 13.03 (1995) [hereinafter NIMMER]; Alan Latman, "Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187 (1990).

The Eleventh Circuit also uses the *Arnstein* test. See *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 459 (11th Cir. 1994) (citing *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821, 829 n.11 (11th Cir. 1982)). See generally "Coming to America" Movie Did Not Infringe on Novel's Protectable Expression, PAT., TRADEMARK & COPYRIGHT J., May 19, 1994, at 83.

<sup>47</sup> 562 F.2d 1157 (9th Cir. 1977); see generally Sharb, *supra* note 37, at 909. The court criticized the *Arnstein* test, saying that the test would have the untenable result of protecting "a cheaply manufactured plaster statue of a nude." *Krofft*, 562 F.2d at 1162. But the court seems to have forgotten the "merger doctrine" which covers this supposed shortcoming. See NEIL BOORSTYN, *COPYRIGHT LAW* § 10:14 (1981) (explaining the merger doctrine).

The Fourth Circuit also often uses the extrinsic-intrinsic test. See, e.g., *Towler v. Sayles*, 76 F.3d 579 (4th Cir. 1996); see generally *Inference of Access to Work Via Intermediary Is Rejected*, PAT., TRADEMARK & COPYRIGHT J., Mar. 7, 1996, at 568; but cf. 18 ENT. L.J. 5 (1996) (claiming that the intrinsic-extrinsic test used in *Sayles* has been discredited and the preferred method is the one used in *Arden v. Columbia Pictures*, 908 F. Supp. 1248 (S.D.N.Y. 1995) (using the *Arnstein* test)).

<sup>48</sup> *Krofft*, 562 F.2d at 1164. This is also the prerequisite for the *Arnstein* test. See *supra* note 38 and accompanying text.

<sup>49</sup> *Krofft*, 562 F.2d at 1164.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* Experts are usually used for this part of the analysis. *Id.*

Professor Latman criticizes this altered test. He agrees that the *Arnstein* and *Krofft* tests are essentially the same, "[b]ut the respective first prongs pass each other in the night, even though each speaks of dissection by experts. *Arnstein* focuses on copying versus independent production, *Krofft* on copying of ideas rather than copying of expression. . . . *Krofft* virtually assumes copying and therefore is

parently, the purpose behind the extrinsic test is to excise from the two works the portions of expression that have similar ideas. Those portions can then be examined under the intrinsic prong of the test to determine if they are substantially similar.<sup>52</sup> Finally, the intrinsic prong is applied. This test requires the “response of the ordinary reasonable person” to determine if substantial similarity in expression exists.<sup>53</sup>

### 3. Only One Test

Although there has been a great deal of confusion, largely due to the misleading wording in the *Krofft* test,<sup>54</sup> the *Arnstein* test and the

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much less helpful.” See Latman, *supra* note 46, at 1202-03. See also NIMMER, *supra* note 46, at § 13.03[E][3]. The differences between the two tests only seem to matter for summary judgements.

<sup>52</sup> GOLDSTEIN, *supra* note 37, at § 7.3 n.6 (“The court’s characterization of the first—extrinsic—test . . . is possibly misleading, for it is hard to imagine a copyright case in which the ideas underlying the two works will not be similar. . . . Doubtless, all the court intended was to require an initial separation of the unprotected ideas in the plaintiff’s work from its protected expression.”). However, the *Krofft* court claimed that this analysis is what the *Arnstein* test intended: “When the court in *Arnstein* refers to ‘copying’ which is not itself an infringement, it must be suggesting copying merely of the work’s idea, which is not protected by the copyright.” *Krofft*, 562 F.2d at 1165.

<sup>53</sup> *Krofft*, 562 F.2d at 1164. However, the “ordinary reasonable person” must be a representative of the work’s target audience if the work has a specialized market. For instance, if children are the target audience of a certain work, then only children could constitute an “ordinary reasonable person.” *Id.* at 1166-67.

<sup>54</sup> See GOLDSTEIN, *supra* note 37, at § 7.2 n.6 (“The court might have avoided some of this confusion if it had retained the phrasing it had employed in an earlier draft of its opinion that, reportedly, used the term ‘objective’ in place of ‘extrinsic’ and ‘subjective’ in place of ‘intrinsic.’”).

The Ninth Circuit has, in recent years, switched the phraseology of the test, as suggested by Professor Goldstein. The current Ninth Circuit version of the test was set out in *Shaw v. Lindheim*. 919 F.2d 1353 (9th Cir. 1990).

In *Shaw*, the plaintiff had written a pilot script, called *The Equalizer*, for a television show. He delivered the script to Lindheim of NBC, but NBC decided not to produce the show. However, Lindheim read the script when Shaw delivered it. About three years later, Lindheim wrote a similar television series treatment, called *The Equalizer*, for Universal Television. In deciding whether Lindheim’s treatment infringed upon Shaw’s script, the court found that the extrinsic prong:

*Krofft* test do not conflict with one another.<sup>55</sup> In fact, Professor Goldstein asserts that by examining all the cases together, it becomes readily apparent that they all follow the same two-part test to determine copyright infringement.<sup>56</sup> Under both *Arnstein* and *Krofft*, the plaintiff must initially show that the defendant took protected expression.<sup>57</sup> Moreover, both tests allow the use of experts to accomplish this.<sup>58</sup> Second, both the *Arnstein* and *Krofft* tests require the plaintiff to prove that audiences will perceive the defendant's work as substantially similar to the plaintiff's protected expression.<sup>59</sup> Likewise, neither test allows the use of experts for this second prong.<sup>60</sup>

Interestingly, both *Arnstein* and *Krofft* jurisdictions<sup>61</sup> also modify this second prong when examining children's works. Both types of jurisdictions use the "total concept and feel"<sup>62</sup> approach to satisfy the

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includes virtually every element that may be considered concrete in a literary work, [and, therefore,] the extrinsic test as applied to books, scripts, and 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 *Krofft*'s division between expression and ideas.

*Id.* at 1357.

Professor Nimmer explains that the decision is best viewed as holding "that when, objectively speaking, a triable case of expressive similarity exists, the case must be sent to the trier of fact; but when no such objective argument is possible, summary judgment will lie." NIMMER, *supra* note 46, at § 13.03[E][3]. This sounds like the *Arnstein* test all over again.

<sup>55</sup> See GOLDSTEIN, *supra* note 37, at § 7.3; see also Sarah Brashears-Macatee, Note, *Total Concept and Feel or Dissection?: Approaches to the Misappropriation Test of Substantial Similarity*, 68 CHI.-KENT L. REV. 913, 916 (1993).

<sup>56</sup> See GOLDSTEIN, *supra* note 37, at § 7.3.

<sup>57</sup> *Id.*

<sup>58</sup> See Brashears-Macatee, *supra* note 55, at 917; Sharb, *supra* note 37, at 909.

<sup>59</sup> See GOLDSTEIN, *supra* note 37, at § 7.3; Sharb, *supra* note 37, at 910.

<sup>60</sup> See Brashears-Macatee, *supra* note 55, at 917-18; Sharb, *supra* note 37, at 909.

<sup>61</sup> *Arnstein* was decided in the Second Circuit, and the Eleventh Circuit also follows the *Arnstein* test. *Krofft* was decided in the Ninth Circuit, and the Fourth Circuit also follows the *Krofft* test. See *supra* notes 46-47.

<sup>62</sup> "Total concept and feel" is an inquiry used in the substantial similarity prong

substantial similarity prong of the infringement inquiry. Therefore, the "total concept and feel" approach would undoubtedly be applied in the hypothetical case of *Amy v. Andy*.<sup>63</sup>

### C. *Total Concept and Feel: The Substantial Similarity Prong*

The phrase "total concept and feel" was coined and developed in *Roth Greeting Cards v. United Card Company*.<sup>64</sup> In *Roth*, the plaintiff alleged that United Card Company illicitly copied a number of its greeting cards.<sup>65</sup> For example, "a drawing of a colored moppet suppressing a smile" was on the outside of a Roth card, and the words "i wuv you" were on the inside.<sup>66</sup> United marketed a card differing only in minor variations of color and style.<sup>67</sup> The court ruled that United had copied Roth's card and that the evidence showed substantial similarity between United and Roth's cards:

It appears to us that in total concept and feel the cards of United are the same as the copyrighted cards . . . . [T]he characters depicted in the art work, the mood they portrayed, the combination of art work conveying

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when testing for copyright violations. During this inquiry, the jury compares two works in their totality to determine whether the mood evoked by the two works is the same. Under this test "very abstract similarities between two works could support a claim of copyright infringement." Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"*, 38 EMORY L.J. 393, 410 (1989). This "'totality' approach allows a fact-finder to respond to a visceral feeling that something unfair was done." Elliot M. Abramson, *How Much Copying Under Copyright? Contradictions, Paradoxes, and Inconsistencies*, 61 TEMPLE L. REV. 133, 147 (1988).

<sup>63</sup> "Total concept and feel" has been adopted by every Circuit that has addressed the issue. Sharb, *supra* note 37, at 915. These are the Second, Third, Fourth, Seventh, Eighth and Ninth Circuits. *Id.* at n.65. The Supreme Court has not yet considered the question. *Id.*

<sup>64</sup> 429 F.2d 1106, 1110 (9th Cir. 1970). See generally GORMAN & GINSBURG, *supra* note 14, at 131 & 416. But cf. *Smith v. Little, Brown, & Co.*, 245 F. Supp. 451, 459 (S.D.N.Y. 1965), *aff'd*, 360 F.2d 928 (2d Cir. 1966) ("The *concept and pattern* which has been appropriated . . . is the heart and core of plaintiff's work.") (emphasis added).

<sup>65</sup> *Roth*, 429 F.2d at 1106-08.

<sup>66</sup> *Id.* at 1110.

<sup>67</sup> *Id.*

a particular mood with a particular message, and the arrangement of the words on the greeting card are substantially the same. . . .<sup>68</sup>

However, total concept and feel would have likely remained a forgotten, historical, jurisprudential footnote had it not been brought back to the forefront with *Krofft* in 1977.<sup>69</sup> Since the concept's rebirth, both *Krofft* and *Arnstein* jurisdictions have adopted the "total concept and feel" test to comprise the substantial similarity inquiry in a variety of cases.<sup>70</sup>

*Krofft*, even though it does not deal with literature *per se*, is instructive in showing how "total concept and feel" applies to a work that targets children as its audience. In *Krofft*, the court held that the McDonald's McDonaldland commercials infringed on the H. R. Pufnstuf children's television series.<sup>71</sup> The court held the works to be substantially similar because McDonald's commercials "captured the 'total concept and feel' of the Pufnstuf show."<sup>72</sup> It was appropriate for the jury "to find that the over-all impact and effect indicate substantial appropriation,"<sup>73</sup> because any one similarity viewed alone may seem trivial. The court also noted that the subtle differences between two similar characters would not be noticed by an "ordinary reasonable person, let alone a child."<sup>74</sup> Therefore, the totality of the borrowed concepts imbued the defendant's work with the same mood as the plaintiff's and allowed for a finding of infringement.

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<sup>68</sup> *Id.* Note that the phrase, "total concept and feel," appears to be self-defining, having never been formally defined in *Roth* or any case since. See discussion, *supra* II.B.2.

<sup>69</sup> See NIMMER, *supra* note 46, at § 13.03[A][1][c] (supporting that *Krofft* "breathed new life into the phrase" and that, otherwise, "the 'total concept and feel' rubric could have rested largely stagnant in a backwater of copyright law . . ."). However, one year before *Krofft*, the Second Circuit had used the phrase in the then-unheralded *Reyher v. Children's Television Workshop*, 533 F.2d 87, 92 (2d Cir. 1976).

<sup>70</sup> See GOLDSTEIN, *supra* note 37, at § 7.3.

<sup>71</sup> *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977).

<sup>72</sup> *Krofft*, at 1167 (quoting *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970)).

<sup>73</sup> *Id.* at 1169 (quoting *Malkin v. Dubinsky*, 146 F. Supp. 111, 114 (S.D.N.Y. 1956)).

<sup>74</sup> *Id.* at 1167.

The Second Circuit is the only circuit that has dealt directly with children's literature. Prior to the introduction of "total concept and feel," the Second Circuit decided *Smith v. Little, Brown & Co.*<sup>75</sup> In *Smith*, the plaintiff submitted five chapters and a plot outline of an adult novel to the defendant publishing company.<sup>76</sup> Smith's story was based upon Grania O'Malley, a little-known Irish historical figure, who was the only female chieftain of a warlike pirate clan.<sup>77</sup> The Little Brown publishing company rejected Smith's work, but later published a similar children's story on the same subject.<sup>78</sup> The trial court noted that the several similarities were so strong as "to compel, the inference of copying."<sup>79</sup> The Second Circuit concurred with the trial judge:

It is difficult to believe that two people, each sitting down to write a book about Grania O'Malley, entirely independent of each other, would each decide to begin the story on Grania's eighteenth birthday, would each recount that Grania went to watch for her father's return from sea, would each conceive the idea of a party upon her father's return, and would each provide a substantially similar account of that party. The difficulty of ascribing this to coincidence becomes insuperable when we add to this parallel the fact that in each book Grania's horse is named Maeve, in each book she is upbraided for clothing not befitting 'a woman grown,' and that in each book, on her way to watch for her father, she discusses or reflects upon Queen Elizabeth. Nor do I think it plausible that each author would independently invent the unusual matrimonial arrangement under which Grania agreed to spend half her time with her husband's people and half with her own.<sup>80</sup>

Interestingly, the lower court based its decision, in part, on the fact that Little Brown had appropriated the plaintiff's "concept and pattern." In other words, the trial court ruled that the defendant had taken

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<sup>75</sup> 360 F.2d 928 (2d Cir. 1966).

<sup>76</sup> *Smith v. Little, Brown & Co.*, 245 F. Supp. 451, 452 (S.D.N.Y. 1965). The appellate court's decision also sets forth the facts of the case, but the district court's decision provides greater detail.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 453-54.

<sup>79</sup> *Id.* at 458.

<sup>80</sup> *Smith*, 360 F.2d at 929 (quoting *Smith*, 245 F. Supp. at 458).



“the heart and core of the plaintiff’s work.”<sup>81</sup> This opinion appears to be almost prescient of the “total concept and feel” decisions to come.

Later, in *Reyher v. Children’s Television Workshop*,<sup>82</sup> the Second Circuit court decided that the defendant’s story, *My Mother Is The Most Beautiful Woman In The World*, did not infringe on the plaintiff’s story of a similar title.<sup>83</sup> Although the two stories shared a common theme, the court held that any similarity of events resulted from mere *scenes a faire*.<sup>84</sup> Moreover, the court noted that the two stories demonstrate different ideals.<sup>85</sup> Even though the theme of both stories centered upon the circumstance of a lost child trying to find his mother, Reyher’s book focused on how looking at someone with love makes that person look beautiful.<sup>86</sup> In contrast, the Children’s Television Workshop’s story demonstrated that what seems beautiful to some may not be beautiful to others.<sup>87</sup> Most importantly, the court held that the two works had different “total feels.”<sup>88</sup> The plaintiff’s

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<sup>81</sup> *Smith*, 245 F. Supp at 459.

The concept and pattern which has been appropriated is that of a young girl, rugged and uncouth, skilled in horsemanship and marksmanship, who becomes of age, who celebrates that event with revelry, and very shortly thereafter, by reason of her father’s unexpected death, emerges, after a political struggle within the clan, as the chief and leader of her people.

*Id.*

<sup>82</sup> 533 F.2d 87 (2d Cir. 1976), *cert. denied*, 429 U.S. 980 (1976) (borrowing the test from *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970)).

<sup>83</sup> *Id.* at 92-93.

<sup>84</sup> “[S]cenes a faire” are “trite, stock scenes or treatments of facts and ideas.” GORMAN & GINSBURG, *supra* note 14, at 426. Black’s Law Dictionary defines “scenes a faire” as:

A copyright law doctrine referring to incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic. . . . Such material, in an otherwise copyrightable work, is considered unprotected by copyright because it would be natural for it to appear in works dealing with similar subjects or situations.

BLACK’S LAW DICTIONARY 1344 (6<sup>th</sup> ed. 1990).

<sup>85</sup> *Reyher v. Children’s Television Workshop*. 533 F.2d 87, 92 (2d Cir. 1976).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

story contained some specific character development against the rich backdrop of the Ukraine, while the defendant's story did not develop the characters nor provide any meaningful information about the setting.<sup>89</sup>

The *Reyher* court began its opinion by stating that protection is granted "only to the particular expression of an idea and never to the idea itself"<sup>90</sup> and then described the well-known difficulty of determining the exact point where one has gone beyond the idea and into expression.<sup>91</sup> In attempting to make this determination, the court recounted past jurisprudence, showing that stealing a general theme is not the essence of infringement. Rather infringement lies in the theme's "particular expression through similarities of treatment, details, scenes, events and characterization."<sup>92</sup> The court concluded that children's stories, necessarily lacking in complexity, should be analyzed according to their "total concept and feel."<sup>93</sup>

Most recently, the Second Circuit considered the test in *Williams v. Crichton*.<sup>94</sup> In *Crichton*, the plaintiff had written four children's books about a dinosaur amusement park. He claimed that Michael Crichton's adult book, *Jurassic Park*, and Universal Studios' movie of the same title were substantially similar to two of his own books, each thirty pages in length.<sup>95</sup> All of the works shared "a setting of a dinosaur zoo or adventure park, with electrified fences, automated tours, dinosaur nurseries, and uniformed workers. . . ."<sup>96</sup> Both works

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 90.

<sup>91</sup> *Id.* at 91 (quoting *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) ("Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be ad hoc.")(Judge L. Hand)).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> 84 F.3d 581 (2d Cir. 1996); see generally Telephone Interview with Guy Halperin, Attorney for Williams (Feb. 26, 1997); "*Jurassic Park*" Did Not Infringe Protectable Expression of Kids' Books, PAT., TRADEMARK & COPYRIGHT J., June 6, 1996, at 174; 2nd Circuit Affirms *Jurassic Park* Not Similar to Book Series, INTELL. PROP. LITIG. REP., July 24, 1996, at 13; Torrey, *supra* note 11, at F07.

<sup>95</sup> *Crichton*, 84 F.3d at 581.

<sup>96</sup> *Id.* at 589. The court said "these settings are classic scenes a faire that flow from the uncopyrightable concept of a dinosaur zoo." *Id.*

featured a brother and sister pair as the main characters, and characterized the brother as a 'mini-expert' on dinosaurs.<sup>97</sup> Both stories had similar plots and sequence of events<sup>98</sup> including:

encounters with small dinosaurs . . . encounters with brachiosaurs . . . visits to dinosaur nurseries . . . tours with automated vehicles and recorded guides . . . stranded characters encountering ferocious dinosaurs . . . characters in boats being pursued by dinosaurs . . . dinosaurs escaping from paddock fences . . . and characters escaping pack-hunting dinosaurs through the intervention of another dinosaur and a helicopter . . . .<sup>99</sup>

Nevertheless, the court found no substantial similarity, largely because the works effected different "total concepts and feels."<sup>100</sup> The court wrote, "Consideration of the total concept and feel of a work, rather than specific inquiry into plot and character development, is especially appropriate in an infringement action involving children's works, because children's works are often less complex than those aimed at an adult audience."<sup>101</sup> Finally, the court emphasized that the "Jurassic Park works are high-tech horror stories with villainous characters and gruesome bloodshed," but Williams' books "are adventure stories and, although suspenseful in places, have happy endings."<sup>102</sup>

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<sup>97</sup> *Id.* The court observed that Williams' characters were too undeveloped to be copyrightable and "that is the penalty an author must bear for marking [characters] too indistinctly." *Id.* (quoting *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930)).

<sup>98</sup> The sequence of events shows how the plot of a story logically builds from each incident to the next. Author Lois Duncan observes that "the big event usually happens in the fifth chapter. Before that, small events are building up to it. After that, [the author is] trying to resolve it." LITOWINSKY, *supra* note 7, at 58. Finding that a work has the same exact sequence of events as another work would provide some evidence of substantial similarity.

<sup>99</sup> *Crichton*, 84 F.3d at 590 n.3. The *Crichton* court considered "such lists [to be] 'inherently subjective and unreliable,' particularly where 'the list emphasizes random similarities scattered throughout the works.'" *Id.* at 590 (quoting *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1984)).

<sup>100</sup> *Id.* at 589.

<sup>101</sup> *Id.* (citing *Reyher*, 533 F.2d at 91).

<sup>102</sup> *Id.* Particularly troubling in this case is the fact that the court decided the case on a summary judgement motion, substituting its own judgement in place of the layman's on the substantial similarity inquiry. See Telephone Interview with Guy Halperin, *supra* note 94. Copyright has been said to allow the dwarf to stand on the

D. *The Hypothetical: Amy v. Andy*

Given the above case law, it appears that Amy has a very favorable case against Andy,<sup>103</sup> provided that Andy has not only appropriated the plot and characters of Amy's *Fritz and the Blind Man*, but also captured the story's "total concept and feel." The *Crichton* case, while perhaps not beneficial for Amy,<sup>104</sup> may not damage her case because it dealt with the plaintiff's children's books being transformed into an adult novel. However, both *Reyher* and *Krofft* seem to indicate that as long as both the plaintiff's and the defendant's works target children, the burden of demonstrating that the works share the same "total concept and feel" is lighter.<sup>105</sup>

In the hypothetical case of *Amy v. Andy*, the genre is not just children's books, but the specific subcategory of picture books.<sup>106</sup> With as few as two hundred words,<sup>107</sup> picture books offer, perhaps, the strongest case for the application of "total concept and feel." Connie Epstein, an author and expert on children's books, observes that "the text of a picture book is a highly specialized form of fiction, more like po-

shoulders of the giant, but this seems to be a case of the giant standing on the shoulders of the dwarf.

<sup>103</sup> It is assumed that Amy has now registered with the Copyright Office, which is a prerequisite for filing suit, and that she is able to show copying, step one of the infringement test. See discussion *supra* part I.

<sup>104</sup> Plaintiff Williams argued that authors of adult book would merely point to the greater complexity of their works to show that their works do not infringe on children's books, essentially stripping children's books of copyright protection. *Crichton*, 84 F.3d at 590. Simply by embellishing and adding scenes, characters and plots, a copier can render his adult work adequately dissimilar from the children's work. See Telephone Interview with Guy Halperin, *supra* note 94.

<sup>105</sup> See discussion *supra* part II.D; *but cf.* *Aliotti v. R. Dakin & Co.*, 831 F.2d 898 (9th Cir. 1987) (rejecting, on the basis of the merger doctrine, the plaintiff's claim that the defendant's stuffed dinosaurs infringed on her stuffed dinosaurs).

<sup>106</sup> Courts seem to only recognize works that are targeted at "children" as a single classification. However, several sub-categories exist including picture books, young readers, middle readers, and young adult novels. See 1997 WRITER'S & ILLUSTRATOR'S MARKET, *supra* note 3, at 341-42; AMOSS & SUBEN, *supra* note 7, at 23.

<sup>107</sup> See Berridge, *supra* note 3, at 59.

etry than storytelling in its tightness and rhythmic control.”<sup>108</sup> The plot of the picture book must be told in few words and without large complications.<sup>109</sup> The characters and setting are introduced with little or no description.<sup>110</sup> The sequence of events must tell the “story in the simplest way possible, at the same time creating the greatest amount of interest and tension in the reader before the problem is finally solved.”<sup>111</sup>

Without, “total concept and feel,” Amy’s *Fritzi and the Blind Man*

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<sup>108</sup> EPSTEIN, *supra* note 2, at 81. In “structure, theme, and style, picture book writing has singular characteristics that set it apart from other categories.” *Id.* at 82.

Obviously, [the] text must be short like a poem to accommodate a very young child’s short attention span. Each word of a poem or picture book is important to express as clearly and as richly as possible [the] idea. That limitation forces [the author] to choose words carefully and to eliminate ruthlessly words that are unnecessary. Again, like a poem, there should be only one simple idea, and every word must contribute to expressing that idea to make it comprehensible at a young child’s level of experience.

AMMOS & SUBEN, *supra* note 7, at 45-46.

<sup>109</sup> See JEAN E. KARL, HOW TO WRITE AND SELL CHILDREN’S PICTURE BOOKS 48-51 (1994). Other authors discuss the uniqueness of plot development in children’s literature in general. See AMOSS & SUBEN, *supra* note 7, at 32-33; EPSTEIN, *supra* note 2, at 66-79; LITOWINSKY, *supra* note 7, at 51.

<sup>110</sup> See KARL, *supra* note 109, at 51-55.

One of the reasons that writing a picture book text is so difficult is that there is no room for long descriptions. But be assured that if you have come to understand your characters well . . . . The simple telling of your story will be all that the reader needs to know about who and what they are.

*Id.* at 53. Other authors discuss the uniqueness of character development in children’s literature in general. See AMOSS & SUBEN, *supra* note 7, at 31-32; EPSTEIN, *supra* note 2, at 53-65; LITOWINSKY, *supra* note 7, at 46-55. “[I]n a picture book, there is little room in the text for description . . . . Surprisingly, setting can display itself just as character does, through plot and action.” KARL, *supra* note 109, at 54. Other authors discuss the uniqueness of setting in children’s literature in general. See AMOSS & SUBEN, *supra* note 7, at 29-30; EPSTEIN, *supra* note 2, at 27-39; LITOWINSKY, *supra* note 7, at 55-56.

<sup>111</sup> KARL, *supra* note 109, at 57. The pattern must be “spare, but at the same time tell the reader as much as necessary to understand the story.” *Id.* Other authors discuss the sequence of event in children’s literature in general. See LITOWINSKY, *supra* note 7, at 59.

may be construed as little more than a compilation of unprotected ideas<sup>112</sup> and Andy's *Franz and the Button* may be viewed as the sort of entrepreneurial borrowing of ideas that is encouraged by copyright policy.<sup>113</sup> Yet as seen above, writing a children's book is very different than a putting together "mechanical or routine" compilation of ideas.<sup>114</sup> Writing a children's book is an art,<sup>115</sup> and one that merits copyright protection.<sup>116</sup> Without "total concept and feel," Amy has very little chance of getting that protection.

Despite the judicial trend toward application of "total concept and feel" to children's books, several noted copyright scholars question the wisdom of using the "total concept and feel" test in that context.<sup>117</sup>

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<sup>112</sup> See *supra* note 22 and accompanying text.

<sup>113</sup> See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991) (Copyright law "encourages others to build freely upon the ideas and information conveyed by another's work."). Andy will argue:

[The notion] that every new work is in some sense based on the works that precede it is such a truism that it has long been cliché, invoked but not examined. . . . [T]he very act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea . . . . [R]ecombining what is already "out there" in some form . . . is the essence of authorship.

Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 966-67 (1990).

<sup>114</sup> *Feist*, 499 U.S. at 362. "[O]riginality is not a stringent standard; it does not require that fact be presented in an innovative or surprising way . . . . The standard of originality is low, but it does exist." *Id.*

<sup>115</sup> See AMOSS & SUBEN, *supra* note 7, at 45 ("[I]t may help you to think of this genre as similar to poetry."); EPSTEIN, *supra* note 2, at 81 (asserting that a picture book's text is "more like poetry" than prose). See also *supra* notes 106-11 and accompanying text.

<sup>116</sup> For example, suppose that someone wrote a book, entitled *Blue Eggs and Spam*. If *Blue Eggs and Spam* began "That Pam-I-am!/That Pam-I-am/I do not like/that Pam-I-am/Do you like blue eggs and spam," most people would recognize it immediately as a "copy" of Theodor S. Geisel's (Dr. Suess) *Green Eggs and Ham*. See DR. SUESS, *GREEN EGGS AND HAM* (1960). Assume that *Blue Eggs and Spam* roughly tracked *Green Eggs and Ham* all the way to the end. Theodor S. Geisel was a master at crafting a tale with simple, easy-to-read words and little actual plot, but without "total concept and feel," the plagiarist may successfully argue that he merely borrowed the idea of the book.

<sup>117</sup> See GOLDSTEIN, *supra* note 37, at § 7 (asserting that the total concept and feel test often results in the misapplication of the infringement test); NIMMER, *supra* note 46, at § 13.03[A][c]; Yen, *supra* note 62.

Professor Nimmer claims that the “total concept and feel” test “threatens to subvert the very essence of copyright.”<sup>118</sup> He writes:

“Concepts” are statutorily ineligible for copyright protection; for courts to advert to a work’s “total concept” as the essence of its protectible character seems ill-advised in the extreme. Further, the addition of “feel” to the judicial inquiry, being a wholly amorphous referent, merely invites abdication of analysis. In addition, “total concept and feel” should not be viewed as sine qua non for infringement—similarity that is otherwise actionable cannot be rendered defensible simply because of a different “concept and feel.”<sup>119</sup>

Professor Nimmer’s statement supports the obvious propositions that plagiarism does not necessarily constitute a copyright violation,<sup>120</sup> and that a valid test for infringement must possess a degree of objectivity to work logically.<sup>121</sup>

But consider the basic policy behind copyright. The purpose of copyright protection is to “foster the creation and dissemination of intellectual work for the public welfare.”<sup>122</sup> This dissemination of works will only occur when authors’ creations are protected from being pil-

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<sup>118</sup> NIMMER, *supra* note 46, at § 13.03[A][c]. However, Professor Nimmer grudgingly admits, “[i]t may, conceivably, make sense to refer to the ‘total concept and feel’ of a greeting card or game or anthropomorphic fantasy world.” *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> To plagiarize is “[t]o steal and use (the *ideas* or writings of another) as one’s own.” THE AMERICAN HERITAGE DICTIONARY 946 (2d College Ed. 1982) (emphasis added). See Laurie Stearns, Comment, *Copy Wrong: Plagiarism, Process, Property, and the Law*, 80 CAL. L. REV. 513 (1992) (“[L]aw and plagiarism intersect only imperfectly . . . though an instance of plagiarism might seem to be the quintessential act of wrongful copying, it does not necessarily constitute a violation of copyright law.”).

<sup>121</sup> See NIMMER, *supra* note 46, at § 13.03[A][c] (insisting that the use of the “total concept and feel” standard “does little to bring order to the inquiry into what constitutes substantial similarity, and would be better abandoned.”).

<sup>122</sup> REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW C.2.a. (1961), reprinted in GORMAN & GINSBURG, *supra* note 14, at 13-16. See also U.S. CONST. art. I, § 8, cl. 8 (declaring that the purpose of copyright is to “to promote . . . the useful arts”); L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT 158 (1991) (stating that “[a] basic function of copyright is to protect copyright owners against piracy by competitors” and thereby foster the incentive to create works for the public).

ferred and sold.<sup>123</sup> In assuring the author the profit of his labor, the author will have incentive to create new works. If authors can expect no reasonable protection for their work, few will have adequate impetus to create. Few authors can afford to write purely for the love of writing. Therefore, if children's stories are allowed to be pirated without the worry of copyright infringement prosecution, the market for these works could well be destroyed, frustrating copyright's very purpose.<sup>124</sup>

The "total concept and feel" approach protects the children's book market. The approach simply represents the recognition that children's literature is a unique genre,<sup>125</sup> requiring a different test to afford it with adequate protection. Indeed, "total concept and feel" is not the "wholly amorphous referent"<sup>126</sup> that Nimmer claims. The objectivity is inherent in the first prong of the infringement test, which determines if copying occurred.<sup>127</sup> Only in the second prong is the subjectivity of "total concept and feel" introduced.<sup>128</sup> Moreover, this prong, even without "total concept and feel," is subjective by its very nature.<sup>129</sup>

Historically, this recognition has already been given to other genres. Judge Hand said that the main substance of a play is the characters and sequence of incident.<sup>130</sup> He thought that plays "may often be most effectively pirated by leaving out the speech, for which a substitute can be found which keeps the whole dramatic meaning."<sup>131</sup>

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<sup>123</sup> See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (holding that copyright "is intended to motivate the creative activity of authors and inventors by the provision of a special reward.").

<sup>124</sup> See GOLDSTEIN, *supra* note 37, at 4 ("Drawing the line of copyright too short will fail to give the author his due . . .").

<sup>125</sup> See discussion *supra* part III.D.

<sup>126</sup> NIMMER, *supra* note 46, at § 13.03[A][c].

<sup>127</sup> See discussion *supra* part III.B.

<sup>128</sup> *Id.* Furthermore, "total concept and feel" is only one of the elements considered. Courts using "total concept and feel" also examine character development, sequence of events, and plot. See, e.g., *Williams v. Crichton*, 84 F.3d 581, 589-90 (1996).

<sup>129</sup> See discussion *supra* part III.B.

<sup>130</sup> *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

<sup>131</sup> *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936), *cert. denied*, 298 U.S. 669 (1936), 106 F.2d 45 (2d Cir. 1939), *aff'd*, 309 U.S. 390



Likewise, Goldstein observed that in plays “literary style is less important, [so] courts look for protectible expression in the elaboration of theme, plot and incident.”<sup>132</sup> These are not necessarily easier standards, just different ones uniquely tailored to different genres of expression.<sup>133</sup> In the same way, “total concept and feel” gives children’s literature the unique protection it needs as a unique genre.<sup>134</sup>

Even with “total concept and feel,” plaintiffs are not winning cases in record numbers. In fact, of reported infringement cases involving more complex “adult” stories or novels, defendants win the vast majority of the time.<sup>135</sup> Even if the plaintiff author can clearly list the similarities, like in *Crichton*, courts are still quite hesitant to find infringement.<sup>136</sup> Even when the defendant admits copying, substantial similarity can be very difficult to prove.<sup>137</sup> Children’s literature, with its intentional low level of complexity and spare usage of words, is

(1940)(damages).

<sup>132</sup> See GOLDSTEIN, *supra* note 37, at § 8.1.1.1.

<sup>133</sup> *Id.*

<sup>134</sup> See discussion *supra* part III.C.

<sup>135</sup> See GOLDSTEIN, *supra* note 37, at § 8.1.1.1. This survey not only includes all jurisdictions, but also appears to include all the “total concept and feel” cases.

<sup>136</sup> See also *Lane v. Universal City Studios, Inc.*, 1994 U.S. App. LEXIS 23769 (9th Cir. Aug. 29, 1994). Plaintiff Lane alleged that Universal copied her screenplay, “Where Have All the Soldiers Gone I,” and used it for a “Kojak” episode. Lane listed 27 similarities between the two works to demonstrate the significance of the copying. *Id.* The court responded that these were “general plot ideas, ordinary phrases, or stock scenes . . . . [T]he list is a compilation of ‘random similarities scattered throughout the works,’ and therefore has limited value in determining substantial similarity.” *Id.* (quoting *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045-46 (9th Cir. 1994) (quoting *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1984) *cert. denied*, 470 U.S. 1052 (1985))); *Towler v. Sayles*, 76 F.3d 579, 584 (4th Cir. 1996) (holding that an expert’s “extensive array” of similarities is an inherently unreliable list).

<sup>137</sup> See, e.g., *Arden v. Columbia Pictures*, 908 F. Supp. 1248 (S.D.N.Y. 1995). See generally 18 ENT. L.J. 4 (1996); “*Groundhog Day*” *Movie Did Not Infringe Novel’s Protectable Expression*, PAT., TRADEMARK & COPYRIGHT J., Jan. 25, 1996, at 418. Columbia Pictures admitted to copying the idea for the movie, “*Groundhog Day*” from Arden’s novel, “*One Fine Day*.” *Arden*, 908 F. Supp. at 1248. But despite a number of similarities, the court refused to find an infringement because the plot, mood, characters, pace, setting and sequence were too different. *Id.*

obviously more vulnerable than this "adult" fare.<sup>138</sup>

### III. CONCLUSION

The "total concept and feel" test appears to be an appropriate middle ground, providing the necessary heightened protection to children's literature, while preserving sufficient ties to the core doctrinal copyright tests.<sup>139</sup> In fact, despite Professor Nimmer's protestations, the test does not seem too far afield from answering the threshold question of how similar is *too* similar under either the traditional *Arnstein* or *Krofft* tests.<sup>140</sup> Under the traditional test, the jury uses no formula and is not forced to articulate the exact point at which the defendant went too far. The jury simply judges.<sup>141</sup> Professor Goldstein agrees by asserting that "[u]ltimately these cases require a court to make a value judgement."<sup>142</sup> This is an area that calls for judgement

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<sup>138</sup> See Berridge, *supra* note 3, at 59.

<sup>139</sup> Some commentators have suggested that a different test altogether should be used for children's literature, like the diminished value test: "To constitute an invasion of copyright it is not necessary that the whole of a work should be copied . . . if so much is taken that the value of the original is sensibly diminished . . . that is sufficient to constitute infringement." *Sid & Marty Krofft Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1169 n.13 (quoting *Universal Pictures Co., Inc. v. Harold Lloyd Corp.*, 162 F.2d 354, 361 (9th Cir. 1947)). Furthermore, the *Krofft* court did not think that this was a true test of infringement, but should be considered an indication thereof. *Id.* However, this loss of value clearly does not show copyright infringement. Besides smacking of the 'sweat of the brow' doctrine overturned in *Feist*, the loss of value only goes toward showing damages after an infringement has been found. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). In short, the diminished value test does not address the central issue, but side-steps it in favor of administrative ease.

<sup>140</sup> See BOORSTYN, *supra* note 47, at § 10:14 ("This is without doubt the most vexed question in the law of copyright and the tests for determining that crux issue are 'of necessity vague.'" (quoting *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487 (2d Cir. 1960)).

<sup>141</sup> Justice Story observed that copyright and patent cases are "nearer than any other class of case belonging to forensic discussions, to what may be called the metaphysics of the law where the distinctions are, or least may be, very subtle and refined, and, sometimes, almost evanescent." *Folsom v. Marsh*, 9 F.Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901).

<sup>142</sup> GOLDSTEIN, *supra* note 37, at § 7. In Professor Peter Jaszi's extensive writings on the nature of authorship, he observes that "[t]he problem, of course, is that

in its purest form.<sup>143</sup> After all, somewhere along the continuum of no similarity at all to verbatim copying, “lies an infinite variety of factual situations that must be determined on an ad hoc basis.”<sup>144</sup>

“Total concept and feel” requires this sort of decision-making. Ultimately, a jury must take two works’ juxtaposed expressions and decide whether the works are similar to the point of one work infringing upon the creativity of the other. Total concept and feel is merely the unique tool that allows that determination to be made in the context of children’s literature.

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that idea/expression line have proved difficult or impossible to draw in practice.” Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship”* 455, 465 (1991). Logically, then, judging these cases requires a value judgement, an “I know it when I see it” type of decision.

<sup>143</sup> See Abramson, *supra* note 62, at 147 (agreeing that total concept and feel “allows a fact-finder to respond to a visceral feeling that something unfair was done”); GOLDSTEIN, *supra* note 37, at § 7 (“the inquiry is inescapably contextual”); Sharb, *supra* note 37, at 904 (asserting that infringement cases are primarily ad hoc, “I know it when I see it” determinations);

A partial solution to the confusion regarding where to draw the line may lie in *Roth* itself. The cards in the case were compilations, the elements of which were not copyrightable by themselves. See GORMAN & GINSBURG, *supra* note 14, at 131. The court, while announcing the “total concept and feel” test, twice noted that the cards’ resemblance to one another was “*remarkable*” even to the casual observer. *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970) (emphasis added).

<sup>144</sup> *Roth*, 429 F.2d at 1110.