c. Another Contemporary Approach: The Ninth Circuit

Courts in the Ninth Circuit take a somewhat different approach to the problem of substantial similarity. Consider the following group of cases.

Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.

562 F.2d 1157 (9th Cir. 1977)

[Sid and Marty Krofft had created a children's TV show called H.R. Pufnstuf that featured a fantasy land and costumed characters. Needham, Harper & Steers, Inc. (Needham) designed an ad campaign for the McDonald's fast food chain that featured fanciful costumed characters inhabiting McDonaldland. The lower court held that the McDonaldland television commercials infringed the plaintiffs' copyright in the H.R. Pufnstuf television show. The court's judgment was based on the jury's answers to special interrogatories.]

CARTER, J.: This is a copyright infringement action . . . alleg[ing] inter alia, that the McDonald land advertising campaign infringed the copyrighted H.R. Pufnstuf television episodes as well as various copyrighted articles of Pufnstuf merchandise. . . .

. . . The jurors were shown for their consideration on the question of infringement: (1) two H.R. Pufnstuf television episodes; (2) various items of H.R. Pufnstuf merchandise, such as toys, games, and comic books; (3) several 30 and 60 second McDonaldland television commercials; and (4) various items of McDonaldland merchandise distributed by McDonald's, such as toys and puzzles. . . .

The real task in a copyright infringement action . . . is to determine whether there has been copying of the expression of an idea rather than just the idea itself. "[N]o one infringes, unless he descends so far into what is concrete [in a work] as to invade . . . [its] expression." Only this expression may be protected and only it may be infringed.

The difficulty comes in attempting to distill the unprotected idea from the protected expression. No court or commentator . . . has been able to improve upon Judge Learned Hand's famous "abstractions test" articulated in *Nichols v. Universal Pictures Corporation*. . . .

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

The determination of whether there is substantial similarity in ideas may often be a simple one. [For] example . . . the idea . . . embodied [in a plaster statue of a nude] is a simple one — a plaster recreation of a nude human figure. A statue of a horse or a painting of a nude would not embody this idea and therefore could not infringe. The test for similarity of ideas is still a factual one, to be decided by the trier of fact.

We shall call this the "extrinsic test." It is extrinsic because it depends not on the responses of the trier of fact, but on specific criteria which can be listed and analyzed. Such criteria include the type of artwork involved, the materials used, the subject matter, and the setting for the subject. Since it is an extrinsic test, analytic dissection and expert testimony are appropriate. Moreover, this question may often be decided as a matter of law.

The determination of when there is substantial similarity between the forms of expression is necessarily more subtle and complex. As Judge Hand candidly observed, "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." If there is substantial similarity in ideas, then the trier of fact must decide whether there is substantial similarity in the expressions of the ideas so as to constitute infringement.

The test to be applied in determining whether there is substantial similarity in expressions shall be labeled an intrinsic one — depending on the response of the ordinary reasonable person. . . . It is intrinsic because it does not depend on the type of external criteria and analysis which marks the extrinsic test. As this court stated in *Twentieth Century-Fox Film Corp. v. Stonesifer*, 140 F.2d 579, 582 (9th Cir. 1944):

> "The two works involved in this appeal should be considered and tested, not hypercritically or with meticulous scrutiny, but by the observations and impressions of the average reasonable reader and spectator."

Because this is an intrinsic test, analytic dissection and expert testimony are not appropriate. . . .

The Tests Applied

In the context of this case, the distinction between these tests is important. Defendants do not dispute the fact that they copied the idea of plaintiffs' Pufnstuf television series — basically a fantasyland filled with diverse and fanciful characters in action. They argue, however, that the expressions of this idea are too dissimilar for there to be an infringement. They come to this conclusion by dissecting the constituent parts of the Pufnstuf series — characters, setting, and plot — and pointing out the dissimilarities between these parts and those of the McDonaldland commercials.

This approach ignores the idea-expression dichotomy alluded to in *Arnstein* and analyzed today. Defendants attempt to apply an extrinsic test by the listing of dissimilarities in determining whether the expression they used was substantially similar to the expression used by plaintiffs. That extrinsic test is inappropriate; an intrinsic test must here be used. . . . Analytic dissection, as defendants have done, is therefore improper. . . .

The present case demands an even more intrinsic determination because both plaintiffs' and defendants' works are directed to an audience of children. This raises the particular factual issue of the impact of the respective works upon the minds and imaginations of young people. As the court said in *Ideal Toy Corp. v. Fab-Lu Ltd.*, 261 F. Supp. 238, 241-42 (S.D.N.Y. 1966), *aff'd*, 360 F.2d 1021 (2 Cir. 1966):

> "In applying the test of the average lay observer, (children) are not to be excluded — indeed they are the 'far-flung faithful . . . audience.' The television advertising campaign of plaintiff was directed toward acquainting these youngsters with . . . its [product]. . . . It is the youngsters who, on the basis of this impression, go to the stores with their parents or at home make their wishes known for the [products] they desire after television has made its impact upon them. In their enthusiasm to acquire . . . the [products] they certainly are not bent upon 'detecting disparities' or even readily observing upon inspection [ ] fine details. . . ." . . .

The H. R. Pufnstuf series became the most popular children's show on Saturday morning television. This success led several manufacturers of children's goods to use the Pufnstuf characters. It is not surprising, then, that McDonald's hoped to duplicate this peculiar appeal to children in its commercials. It was in recognition of the subjective and unpredictable nature of

children's responses that defendants opted to recreate the H. R. Pufnstuf format rather than use an original and unproven approach.

Defendants would have this court ignore that intrinsic quality which they recognized to embark on an extrinsic analysis of the two works. For example, in discussing the principal characters — Pufnstuf and Mayor McCheese — defendants point out:

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

So not only do defendants remove the characters from the setting, but dissect further to analyze the clothing, colors, features, and mannerisms of each character. We do not believe that the ordinary reasonable person, let alone a child, viewing these works will even notice that Pufnstuf is wearing a cummerbund while Mayor McCheese is wearing a diplomat's sash.

Duplication or near identity is not necessary to establish infringement. . . .

We have viewed representative samples of both the H. R. Pufnstuf show and McDonaldland commercials. 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. *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970). We would so conclude even if we were sitting as the triers of fact. There is no doubt that the findings of the jury in this case are not clearly erroneous. . . .

NOTES AND QUESTIONS

1. How does *Krofft* compare to *Arnstein*? Is *Krofft*'s "extrinsic" test, which allows for dissection and expert testimony, the same as *Arnstein*'s test for copying in fact? Under *Krofft*'s approach, similarity of "general ideas" seems intended to serve as a preliminary "filter" in the improper appropriation analysis. Does that approach make sense? Why, or why not? Is a similarity-of-general-ideas test likely to eliminate a meaningful number of cases of alleged infringement? In the end, do *Krofft* and *Arnstein* use the same test for improper appropriation of copyrightable expression?

2. The *Krofft* court also refers to the "total concept and feel" test developed by the Ninth Circuit in *Roth Greeting Cards*, Chapter 2, pages 112-13 *supra*, to evaluate the similarity of compilations of otherwise unprotectible elements. Is this simply another way of restating the "intrinsic" ordinary observer test? Is there a significant difference between assessing similarity of ideas and assessing similarity of concepts? Is saying that two works are similar in "feel" a good way of describing similarity of protected expression?

At some level, all works can be viewed as "compilations" of their constituent elements. Copyright law sometimes strains to provide appropriate protection for the compiler without extending protection to mere ideas. Should the degree of similarity required to prove infringement be higher or lower in the case of a "total concept and feel" analysis?

3. Do you think juries using the *Krofft* test are equipped to guard against the risk of holding a defendant liable when he has taken only unprotected material? How would you frame the issue for the fact-finder to lessen the chances of finding liability mistakenly? How would you write the jury instructions in *Krofft*?

4. Recall the *Arnstein* court's observation in footnote 22 that it would be appropriate to exclude the tone-deaf from the jury in a case involving musical compositions. To what extent

should the ordinary observer test dictate jury selection? Because children cannot serve on juries, should the parties in *Krofft* have been required to test for wrongful copying using focus groups of seven-year-olds?