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## War of the Dolls: Did the Ninth Circuit Fail to Apply the “Intended Audience Test” in Holding Substantial Similarity Should Be Determined from the Perspective of the “Ordinary Observer” and Not a “Child” in *Mattel, Inc. v. MGA Entertainment, Inc.*?

Emily Flasz

*Pace Law School*, [eflasz@law.pace.edu](mailto:eflasz@law.pace.edu)

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## War of the Dolls: Did the Ninth Circuit Fail to Apply the “Intended Audience Test” in Holding Substantial Similarity Should Be Determined from the Perspective of the “Ordinary Observer” and Not a “Child” in *Mattel, Inc. v. MGA Entertainment, Inc.*?

### Abstract

Emily Flasz writes an article on the application of the substantial similarity test in copyright infringement cases. Her article addresses whether the second prong of the substantial similarity test, the “intrinsic test,” should include the “intended audience test” when the works in issue are intended for children. She examines this question within the context of the Ninth Circuit’s decision in *Mattel, Inc. v. MGA Entertainment, Inc.* and provides an in depth look at how the Second, Third, Fourth, Sixth, and Ninth Federal Circuit Courts have applied the “intended audience test” when the works in dispute are intended for specialized audiences, particularly children.

### Cover Page Footnote

Emily Flasz is a J.D. and Environmental Law Certificate Candidate at Pace University School of Law. She is also an Associate Member of the PACE I.P., SPORTS AND ENTERTAINMENT LAW FORUM, Co-President of the Second Annual Exposition on Intellectual Property, Sports and Entertainment Law and Secretary of Women’s Association of Law Students. Emily would like to thank her family and friends for their guidance and support throughout this undertaking, as well as members of the PACE I.P., SPORTS, AND ENTERTAINMENT LAW editorial staff for their comments and suggestions during the editing process

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Entertainment, Inc.?**

Emily Flasz<sup>1</sup>

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<sup>1</sup> Emily Flasz is a J.D. and Environmental Law Certificate Candidate at Pace University School of Law. She is also an Associate Member of the PACE INTELLECTUAL PROPERTY, SPORTS AND ENTERTAINMENT LAW FORUM, Co-President of the Second Annual Exposition on Intellectual Property, Sports and Entertainment Law and Secretary of Women’s Association of Law Students. Emily would like to thank her family and friends for their guidance and support throughout this undertaking, as well as members of the PACE INTELLECTUAL PROPERTY, SPORTS, AND ENTERTAINMENT LAW editorial staff for their comments and suggestions during the editing process.

**INTRODUCTION:**

Since 1959, Barbie has been an American icon and the queen of the fashion-doll market. However, in 2001, Bratz fashion-dolls entered the market, and their funky, chic attitudes became “must-haves” for little girls everywhere. Within five years Bratz ballooned into a billion dollar global phenomenon, and after sixty years of being the sole force within the doll industry, Barbie met its match.<sup>2</sup> Ironically, the Bratz concept was developed by, now former Mattel employee, Carter Bryant.<sup>3</sup> While Bryant was still employed at Mattel he pitched the Bratz doll idea to MGA Entertainment Inc. (MGA), and presented preliminary sketches along with a crude mock-up of the doll.<sup>4</sup> After MGA offered Bryant a consulting agreement to develop the Bratz brand; Bryant immediately resigned from Mattel, signed a consulting agreement with MGA Entertainment Inc. and began working the Bratz collection.<sup>5</sup> The drawings Bryant used to pitch the Bratz idea to MGA were the basis for the first generation of Bratz dolls, named Cloe, Yasmin, Sasha and Jade.<sup>6</sup>

**JUDICIAL BACKGROUND:**

In 2004 Mattel filed suit in the United States District Court for the Central District of California (“District Court”) against Carter Bryant for violation of his employment agreement, and against Mattel for copyright infringement and misappropriation of trade secrets.<sup>7</sup> In 2008 the District Court, awarded Mattel \$10 million in damages, imposed a constructive trust transferring

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<sup>2</sup> Parija Kavilanz, *Bratz are back! Watch out, Barbie*, CNN MONEY (June 23, 2011), [http://money.cnn.com/2011/06/22/news/companies/bratz\\_barbie\\_dolls\\_war/index.htm](http://money.cnn.com/2011/06/22/news/companies/bratz_barbie_dolls_war/index.htm).

<sup>3</sup> *Mattel, Inc. v. MGA Entm't, Inc.*, No. CV 04-9049 DOC (RNBx), 2010 WL 3705902 (C.D. Cal. Sept. 22, 2010)(the jury found that Bryant thought of the “Bratz” and “Jade” names, and created the preliminary sketches and sculpt, while he was employed by Mattel).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 908 (9th Cir. 2010), *amended on denial of reh'g* (Oct. 21, 2010) [hereinafter *Mattel v. MGA Entm't*].

<sup>7</sup> *Mattel v. MGA Entm't*, 616 F.3d at 904.

competitor's "Bratz" trademark portfolio to manufacturer, and enjoined future acts of copyright infringement. MGA and Bryant appealed.<sup>8</sup>

MGA appealed to the United States Court of Appeals for the Ninth Circuit. On July 22, 2010, the Circuit Court reversed and remanded the District Court decision.<sup>9</sup> Chief Judge, Kozinski, author of the Circuit Court opinion held that:

(1) The employment agreement did not unambiguously require assignment of employee's idea for a new line of fashion dolls; (2) awarding constructive trust was abuse of discretion; (3) the employment agreement was ambiguous as to whether it covered only works created within the scope of employment, or whether it covered works created on employee's own time; and (4) fashion dolls with a bratty look or attitude, or dolls sporting trendy clothing were unprotectable ideas.<sup>10</sup>

After the case was remanded to the District Court, an eight-person jury returned a verdict against Mattel on April 21, 2011 finding that Mattel did not own a copyright in the creative designs behind the dolls. However, the jury found that Mattel misappropriated twenty-six of MGA's trade secrets and awarded MGA \$3.4 million for each misappropriated trade secret for an approximate total of \$88.5 million.<sup>11</sup>

Although, the District Court jury on remand ultimately found Mattel did not own a copyright in creative designs behind the Bratz doll's or conduct the "substantial similarity test" directed by the Ninth Circuit, this paper will explore how the Ninth Circuit improperly defined the "substantial similarity" test in *Mattel v. MGA Entm't* when the court held that substantial similarity should be determined from the perspective of the "ordinary observer" and not a child,

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<sup>8</sup> Bryant v. Mattel, Inc., CV 04-9049SGLRNBX, 2008 WL 5598275 (C.D. Cal. Dec. 3, 2008), *vacated sub nom.* Mattel, Inc. v. MGA Entm't, Inc., 616 F.3d 904 (9th Cir. 2010).

<sup>9</sup> *Mattel v. MGA Entm't*, 616 F.3d at 904.

<sup>10</sup> *Id.*

<sup>11</sup> Mattel, Inc. v. MGA Entm't, Inc., No. 2:04-cv-04-09049-DOC-RNB (C.D. Cal. 2011) (*available at* <http://tsi.brooklaw.edu/sites/tsi.brooklaw.edu/files/filings/carter-bryant-v-mattel-inc-mattel-inc-v-mga-entertainment-inc/20110421redacted-jury-verdict-form.pdf>.)

failing to include within the “intrinsic analysis” the “intended audience test.” In addressing this question the paper will first discuss what a copyright protects. Second, the paper will explain how copyright infringement is determined under the substantial similarity tests and review the two basic approaches of the Circuit Courts. Third, the development of the substantial similarity test in the Ninth Circuit will be outlined. Fourth, the paper will analyze how the “intended audience test” has been adopted by the Second, Third, Fourth, Sixth, and Ninth Federal Circuits when the works in dispute are intended for specialized audiences. Finally, the paper demonstrates how the Ninth Circuit misapplied the substantial similarity test by failing to include within the “intrinsic analysis” the “intended audience test,” holding substantial similarity should be determined from the perspective of the “ordinary observer,” instead of a child.

## **I. WHAT DOES A COPYRIGHT PROTECT?**

A person who obtains a copyright pursuant to 17 U.S.C. § 102 obtains “a limited duration monopoly,” allowing the individual to employ the work without any restrictions and fear it will be copied.<sup>12</sup> Copyright protection covers original works of authorship that have been fixed into a tangible form expression.<sup>13</sup> However, copyright protection never extends to ideas.<sup>14</sup> A work can be copyrighted if it is: “(1) original; (2) an expression of an author; (3) of non-utilitarian nature; (4) in a fixed tangible medium of expression.”<sup>15</sup>

The purpose of copyright is to protect and generate creativity.<sup>16</sup> Copyright law grants the author exclusive rights to prevent others from reaping the benefits of the time, money, and effort

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<sup>12</sup> DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 206 (7<sup>th</sup> ed. 2009); 33 U.S.C. § 102 (2006).

<sup>13</sup> 17 U.S.C. § 102 (2006).

<sup>14</sup> *Id.*

<sup>15</sup> MARK LITWAK, *DEALMAKING IN THE FILM AND TELEVISION INDUSTRY FROM NEGOTIATIONS TO FINAL CONTRACTS* 300 (3<sup>rd</sup> ed. 2009).

<sup>16</sup> DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 206 (7<sup>th</sup> ed. 2009).

the she sacrificed to develop her idea. Those rights include the right to: (1) reproduce the work; (2) distribute copies of the work; (3) perform the work publicly (4) make a derivative of the work; (5) display the work publicly.”<sup>17</sup> Once a person obtains a copyright she has the option of assigning away her rights, and charge for the use of their expression.<sup>18</sup> In conclusion, copyright law protects the financial interests and competitive market needed for innovative thinkers to develop their ideas into tangible expressions.

## II. THE DETERMINATION OF COPYRIGHT INFRINGEMENT UNDER THE SUBSTANTIAL SIMILARITY TEST

To establish a successful copyright infringement claim, a plaintiff must show ownership of a copyright for the work, that the defendant had access to the copyrighted work and that the defendant’s work infringes on protected elements of the plaintiffs work.<sup>19</sup> The court must apply the “substantial similarity test” to determine whether the defendant copied protected elements of the plaintiffs work. The essence of the test is whether an ordinary observer would afford the alleged violator’s work with the same unique and creative attraction as the original work, in effect, diminishing the value of the original work.<sup>20</sup> This substantial similarity test is approached by each Circuit Court differently, yet, each Circuit’s test embodies the same concept.

The” substantial similarity test” consists of a two-step analysis; the first step employs the “extrinsic test” and “intrinsic test,” and the second step involves “analytic dissection test” and “the ordinary observer test.”<sup>21</sup> The “extrinsic test” is an objective comparison of specific

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 207.

<sup>19</sup> *See, e.g.,* Mattel, Inc. v. MGA Entm’t, Inc., 616 F.3d 904, 913 (9th Cir. 2010), *amended on denial of reh'g* (Oct. 21, 2010) (citing *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 913 (9th Cir.1987)).

<sup>20</sup> *Country Kids 'N City Slicks, Inc. v. Sheen*, 77 F.3d 1280 (10th Cir. 1996).

<sup>21</sup> *See Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977) (holding the first prong of the substantial similarity test requires analytic dissection aided by expert testimony to determine the substantial similarity of “ideas”) [hereinafter *Krofft McDonald’s Corp.*]; *Arnstein v. Porter*, 154 F.2d 464, 468

expressive elements.<sup>22</sup> The test aids the court in its determination of whether the two works “share a similarity of ideas and expression measured by external, objective criteria.”<sup>23</sup>

Application of the test requires the court to conduct “analytical dissection of the work at issue and expert testimony.”<sup>24</sup> During analytical dissection the court filters out the protectable portions of the work because Copyright law only protects an author's original tangible expression.<sup>25</sup>

Ideas, unoriginal components, and scenes a fair (standards features) are unprotectable under copyright law and therefore, unreviewable by the court in its final determination of copyright infringement.<sup>26</sup> However, it is important to recognize that although portions of the work when separate are unprotectable, the coordination and arrangement of individually unprotected items may be copyrightable.<sup>27</sup> Therefore, a plaintiff may satisfy the extrinsic test if the court finds the combination of those elements sufficiently creative.<sup>28</sup>

The Circuit Courts have essentially adopted two approaches to the first step of the substantial similarity test. The First, Second, Third Circuit follow the *Arnstein v. Porter* approach, where the first step requires the trier of fact to determine through dissection analysis and expert testimony, whether the similarities between the works are sufficient enough to

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(2d Cir. 1946)[hereinafter *Arnstein*] (holding first the court must conduct analytic dissection to determine whether there has been “copying,” and second the court must determine whether the “reasonable observer” would find copying was substantial enough to find “unlawful appropriation”).

<sup>22</sup> *Amini Innovation Corp. v. Anthony California, Inc.*, 439 F.3d 1365, 1369-70 (Fed. Cir. 2006) (citing *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002)) (citing *Shaw v. Lindheim*, 919 F.2d 1353, 1356 (9th Cir. 1990)).

<sup>23</sup> *Amini Innovation Corp. v. Anthony California, Inc.*, 439 F.3d 1365, 1369-70 (Fed. Cir. 2006) (citing *Swirsky v. Carey*, 376 F.3d 841, 845 (9th Cir. 2004)).

<sup>24</sup> *Amini Innovation Corp. v. Anthony California, Inc.*, 439 F.3d 1365, 1369-70 (Fed. Cir. 2006) (citing *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000)).

<sup>25</sup> *See, e.g., Country Kids 'N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1285 (10th Cir. 1996); *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 913 (9th Cir. 2010), *amended on denial of reh'g* (Oct. 21, 2010).

<sup>26</sup> *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 913 (9th Cir. 2010), *amended on denial of reh'g* (Oct. 21, 2010) (citing *Shaw v. Lindheim*, 919 F.2d 1353, 1356 (9th Cir. 1990); 17 U.S.C.A. § 102 (2006)).

<sup>27</sup> *Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003).

<sup>28</sup> *Metcalf v. Bochco*, 294 F.3d 1069, 1073 (9th Cir. 2002) (for example, in the court held that even though the elements common to both plaintiff's screenplay and defendant's television series were not individually copyrightable, *Metcalf* passed the extrinsic test because his combination of unprotectable items was copyrightable).



constitute copying.<sup>29</sup> The Fourth, Fifth, Sixth, and Eleventh Circuit have adopted the “extrinsic test” test as the first prong of the substantial similarity test from *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*<sup>30</sup> The “extrinsic test” requires the trier of fact to determine the substantial similarity between the works by conducting analytic dissection through comparing the works ideas based on specific criteria.<sup>31</sup> The Ninth Circuit now applies a modified approach of the *Krofft v. McDonald’s Corp.* test.<sup>32</sup> The difference between these two approaches is when the trier of fact determines copying has actually occurred. In *Arnstein v. Porter* test the determination is made under the first prong, in the *Krofft v. McDonald’s Corp.* test the determination is reserved for the trier of fact in the second prong.<sup>33</sup> Once the unprotectable elements are removed only the author’s particular expression of the idea is left, which is protectable.<sup>34</sup> Next, the court applies the “intrinsic test” also known as the “reasonable observer analysis.”

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<sup>29</sup> *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946) (it is worth noting that the result in *Arnstein* – to reverse summary judgment to defendant Cole Porter on Arnstein’s claim that Porter hired “stooges” to follow him around and steal his songs – seems crazy. Arnstein was a serial litigant who sued any number of famous musicians alleging copying).

<sup>30</sup> *Lyons P’ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789 (4th Cir. 2001); *Kohus v. Mariol*, 328 F.3d 848, 858 (6th Cir. 2003); *Baby Buddies, Inc. v. Toys R Us, Inc.*, 611 F.3d 1308, 1316 (11th Cir. 2010); *Positive Black Talk Inc. v. Cash Money Records Inc.*, 394 F.3d 357, 374 (5th Cir. 2004).

<sup>31</sup> *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977).

<sup>32</sup> *See, e.g., Mattel, Inc. v. MGA Entm’t, Inc.*, 616 F.3d 904, 914 (9th Cir. 2010), *amended on denial of reh’g* (Oct. 21, 2010) (explaining that the extrinsic step first starts by determining the breadth of the possible expression of those ideas. If there’s a wide range of expression, then copyright protection is “broad” and a work will infringe if it’s “substantially similar” to the copyrighted work. If there’s only a narrow range of expression, then copyright protection is “thin” and a work must be “virtually identical” to infringe); *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442-43 (9th Cir. 1994) (“As it has evolved, however, the extrinsic test now objectively considers whether there are substantial similarities in *both* ideas and expression, whereas the intrinsic test continues to measure expression subjectively. Because only those elements of a work that are protectable and used without the author’s permission can be compared when it comes to the ultimate question of illicit copying, we use analytic dissection to determine the scope of copyright protection before works are considered as a whole”).

<sup>33</sup> *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970) (holding that the fundamental question of “look and feel” directly to the finder of fact).

<sup>34</sup> *See Mattel, Inc. v. MGA Entm’t, Inc.*, 616 F.3d 904, 913 (9th Cir. 2010), *amended on denial of reh’g* (Oct. 21, 2010) (citing *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442 (9th Cir.1994)).

The Fourth, Sixth, Ninth, and Eleventh Circuits have adopted the “intrinsic test,” which is the subjective prong of the substantial similarity test.<sup>35</sup> The test requires the court to engage in a subjective comparison that focuses on whether the ordinary reasonable audience would find the works are substantially similar in “the total concept and feel of the works.”<sup>36</sup> The “intrinsic test” measures the “substantial similarity in expressions ... depending on the response of the ordinary reasonable person.... [I]t does not depend on the type of external criteria and analysis which marks the extrinsic test.”<sup>37</sup> Unlike the first prong, expert testimony is not considered and analytical dissection of the works is not conducted under the “reasonable observer” analysis.<sup>38</sup> The First, Second and Third Circuits in the second prong apply the “ordinary observer” test, where the trier of fact determines whether the “copying” was so extensive to constitute unlawful appropriation.<sup>39</sup>

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<sup>35</sup> See *id.*; *Herzog v. Castle Rock Entertainment*, 193 F.3d 1241, 1257 (11th Cir. 1999) (“under the intrinsic test, a court will determine whether, upon proper instruction, a reasonable jury would find that the works are substantially similar.” However, unlike the Ninth, Fourth and Sixth Circuit the court has not adopted the “total concept and feel language); *Stromback v. New Line Cinema*, 384 F.3d 283, 297 (6th Cir. 2004) (holding the “reasonable observer” would find “The Keeper” poem and screenplay and “Little Nicky,” were completely dissimilar in both their overall look and feel and in their constituent expressive element).

<sup>36</sup> See, e.g., *Amini Innovation Corp. v. Anthony California, Inc.*, 439 F.3d 1365, 1369 (Fed. Cir. 2006); *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir.2002).

<sup>37</sup> *Shaw v. Lindheim*, 919 F.2d 1353, 1357 (9th Cir. 1990) (holding that a judicial determination under the intrinsic test is now virtually devoid of analysis, for the intrinsic test has become a mere subjective judgment as to whether two literary works are or are not similar).

<sup>38</sup> *Twentieth Century-Fox Film Corp v. Stonesifer*, 140 F.2d 579, 582 (9th Cir. 1944) (holding that in the intrinsic prong of the *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp* two-step substantial similarity analysis, analytic dissection and expert testimony are not appropriate); *Concrete Machinery Co., Inc. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 608-09 (1st Cir. 1988); *Arnstein v. Porter*, 154 F.2d 464 (2d. Cir. 1946) (holding the trier of fact applies the ordinary observer test, unaided by dissection or expert testimony, to determine whether the copying resulted in substantial similarity between the works).

<sup>39</sup> *Arnstein v. Porter*, 154 F.2d 464, 468 (2d. Cir. 1946) (holding that to determine substantial similarity, first the trier of fact must determine whether the defendant copied through analytic dissection and expert testimony, second the trier of fact must determine whether copying is sufficient where the ordinary observer would find “unlawful appropriation”); *Johnson v. Gordon*, 409 F.3d 12, 18 (1st Cir. 2005) (“Second, the plaintiff must establish that the copying is actionable by “prov[ing] that the copying of the copyrighted material was so extensive that a ordinary observer would find infringement and the copyrighted works ‘substantially similar.’”); *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 907 (3d Cir. 1975) (“...must be shown that copying went so far as to constitute improper appropriation, the test being the response of the ordinary lay person.”).

Although, the approaches seem similar in procedure since all three involve first the analytic dissection of the works and then the application of the “ordinary observer” test; their divergence in the second prong is significant in the determination of copyright infringement. The *Krofft v. McDonald’s Corp.* approach only separates out the protectable elements from the works in the first prong, relying heavily on the trier of fact in the “ordinary observer” to determine whether the “total concept and feel” of the works so substantially similar to find copyright infringement. Whereas, the *Arnstein v. Porter* approach determines “copying” through analytic dissection and expert testimony in the first prong, relying only on the trier of fact to determine whether the “ordinary observer” would find that the copying amounted to unlawful appropriation. The delineation in the approaches is critical to the determination of copyright infringement, because the *Arnstein v. Porter* approach allows expert testimony to aid in the determination of “copying,” where the *Krofft v. McDonald’s Corp.* test leaves the decision of copying strictly to the trier of fact.<sup>40</sup> As a result of *Krofft v. McDonald’s Corp.* test’s reliance on the trier of fact in determining whether copying has occurred and thus reached the point of substantial similarity, courts have worked to narrow the scope of determination. The Second, Third, Fourth, and Sixth Circuits have recognized that the “reasonable observer” standard is not sufficient to determine the substantial similarity and have required the trier of fact in certain cases to find whether the works at issue would be found substantially similar from the perspective of the “intended audience.”<sup>41</sup> Since the aim of copyright laws are to protect the

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<sup>40</sup> *Swirsky v. Carey*, 376 F.3d 841 (9<sup>th</sup> Cir. 2004) (reversing the D.C. decision, holding that experts cannot testify to the significance of musical similarities).

<sup>41</sup> *Lyons P’ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789 (4<sup>th</sup> Cir. 2001) (holding the substantial similarity of the costume should be determined from perspective of the intended audience of young children); *Data E. USA, Inc. v. Epyx, Inc.*, 862 F.2d 204, 210 (9<sup>th</sup> Cir. 1988) (Holding that the trier of fact must determine substantial similarity must between karate computer games through the eyes of a discerning 17.5 year old boy); *Kohus v. Mariol*, 328 F.3d 848, 857 (6<sup>th</sup> Cir. 2003) (adopting the intended audience test to determine substantial similarity between drawings of a latch for portable children’s playyard); *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832, 844 n.6 (Fed. Cir. 1992) (holding trier of fact must determine substantial similarity of computer programs through the

commercial value of the products, the Circuit Courts have held that determining copyright infringement from the “intended audience” perspective is imperative in certain instances.<sup>42</sup> For instance, the “ordinary observer” may not find copyright infringement exists where an ordinary person in the “intended audience” would. Therefore, if the determination is not made from the perspective of the intended purchaser, products that will affect the intended market can enter the arena, disregarding the initial purpose of copyright laws fostering and protecting creativity. The “intended audience test” ensures that copyright infringement is properly found and that the commercial value of the original product is not unfairly diminished.<sup>43</sup> The Ninth Circuit has inconsistently applied the “intended audience test.” In *Mattel v. MGA Entm’t* the court plainly failed to apply the test.<sup>44</sup> The Ninth Circuit’s version of the substantial similarity test has evolved throughout the years and now applies a version of the test that this paper has not yet discussed. To provide a better understanding of the courts failure to apply the “intended audience test” this paper will next outline the evolution of the substantial similarity test in the Ninth Circuit.

### **III. THE DEVELOPMENT OF THE SUBSTANTIAL SIMILARITY TEST IN THE NINTH CIRCUIT**

The Ninth Circuit developed the two-part substantial similarity test in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.* The *Krofft* court held that after the objective-extrinsic test reveals similarities in ideas, the court would then apply the second half of the

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reaction of computer programmers, rather than laymen); *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222 (3d Cir. 1986)(Holding that in copyright cases involving exceptional audiences, the court should determine substantial similarity from the viewpoint of the intended audience); *Computer Associates Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 713 (2d Cir. 1992)(Holding that the trier of fact in determining substantial similarity need not be limited by the strictures of its own lay perspective).

<sup>42</sup> *Ideal Toy Corp. v. Fab-Lu, Ltd.*, 261 F. Supp. 238, 242 (S.D.N.Y. 1966) [hereinafter *Ideal Toy Corp*] (“The copyright laws protect not the reputation of the copyright holder, but the commercial value of his creation. Just as the relevant public in *Arnstein v. Porter* was held to be the ‘lay listeners for whom such popular music is composed,’ the relevant public here must include the children for whom the dolls are created.”).

<sup>43</sup> *Id.* at 242.

<sup>44</sup> *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 914 (9th Cir. 2010), *amended on denial of reh'g* (Oct. 21, 2010).

analysis, the intrinsic test.<sup>45</sup> The Ninth Circuit explained that the two steps are separate and involve different analyses. The court held that the intrinsic test requires a pure subjective evaluation from the viewpoint of the reasonable observer, where expert evidence is not considered.<sup>46</sup> However, within the extrinsic prong, the court objectively filters and dissects the protectable features from the unprotectable features of the work, so that the subjective prong can be applied and determine whether the two works are substantially similar.<sup>47</sup> Thirteen years after *Krofft*, the Ninth Circuit reevaluated the extrinsic/intrinsic test in *Shaw v. Lindheim*.

The Ninth Circuit changed the format of the analysis and held that the extrinsic prong would involve the “objective analysis of expression.”<sup>48</sup> The restructure abandoned the prior test where examination of expression occurred exclusively under the subjective-intrinsic prong.<sup>49</sup> According to *Shaw*, rather than striving to compare the ideas of the two works, courts must list the elements of the works and determine whether there is any similarity in the expression of those elements.<sup>50</sup> For example, if a court is determining the substantial similarity between two literary works the court would compare the elements plot, themes, dialogue, mood, setting, pace, sequence of events, and characters.<sup>51</sup> The *Shaw* court also affirmed that the intrinsic test is a “subjective analysis of expression.”<sup>52</sup> However, the court acknowledged that the subjective analysis of expression is no more than the intuitive reaction of the lay observer, and as such is “virtually devoid of analysis.”<sup>53</sup>

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<sup>45</sup> *Id.* at 1164.

<sup>46</sup> *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977).

<sup>47</sup> *Id.* at 1164.

<sup>48</sup> *Shaw v. Lindheim*, 919 F.2d 1353, 1355 (9th Cir. 1990) (holding that the substantial similarity test permits a finding of infringement only if a plaintiff proves *both* substantial similarity of general ideas under the “extrinsic test” and substantial similarity of the protectable expression of those ideas under the “intrinsic test”).

<sup>49</sup> *Id.*

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

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Shaw v. Lindheim*, 919 F.2d 1353, 1355 (9th Cir. 1990).

In *Apple Computer Inc. v. Microsoft Corp.*, the case that the Ninth Circuit relied on in *Mattel v. MGA Entm't*, the court held that “the extrinsic test now objectively considers whether there are substantial similarities in *both* ideas and expression, whereas the intrinsic test continues to measure expression subjectively.”<sup>54</sup> The *Apple* court applied the *Shaw* version of the substantial similarity test and recognized that substantial similarity is to be evaluated objectively and subjectively. However, the court in *Apple* went further and introduced another step to the copyright infringement analysis that the *Mattel* court applied. The Ninth Circuit in *Mattel* explained that since others may freely copy a work's ideas and other unprotectable elements, the court must first determine the breadth of the possible expression of those ideas.<sup>55</sup> The *Mattel* court continued to state that “if there's a wide range of expression (for example, there are gazillions of ways to make an aliens-attack movie), then copyright protection is ‘broad’ and a work will infringe if it's ‘substantially similar’ to the copyrighted work.”<sup>56</sup> However, if there's only a narrow range of expression then copyright protection is “thin” and a work must be “virtually identical” to infringe.<sup>57</sup> This analysis completely changes the substantial similarity test, and now requires the court to determine objectively in the extrinsic prong, and subjectively in the intrinsic prong whether the two works are “substantially similar” or “virtually identical” depending on the specific features “breadth of expression.”

The Ninth Circuit in *Mattel v. MGA Entm't* applied the “broad vs. thin analysis,” objective-extrinsic test, and subjective-intrinsic test in its analysis. However, the court failed to

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<sup>54</sup> *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442-43 (9th Cir. 1994) [hereinafter *Apple*] (citing *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1476 (9th Cir. 1992)).

<sup>55</sup> *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 914 (9th Cir. 2010), *amended on denial of reh'g* (Oct. 21, 2010) (citing *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442-43 (9th Cir. 1994)).

<sup>56</sup> *Id.* at 1442-43 (explaining that there are only so many ways to paint a red bouncy ball on blank canvas).

<sup>57</sup> *Id.* at 1442-43 (citing *Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir.2003)) (holding that a glass-in-glass jellyfish sculpture was only entitled to thin protection against virtually identical copying due to the narrow range of expression).

conduct the intrinsic test from the viewpoint of the Bratz and Barbie doll's "intended audience."<sup>58</sup> As mentioned above the Second, Third, Fourth, and Sixth Federal Circuits have held that the "intended audience test" is appropriate in circumstances where the "ordinary observer" is not the audience that is purchasing the item, and would not adequately protect the commercial value of the product. For instance, an adult may find that two dolls are dissimilar in their make, model, coloring or "overall look," but, from the perspective of a child the items may appear so similar that the original items value would be significantly diminished if the defendants' product were to enter the market. The Second, Third, Fourth and Sixth Federal Circuit have recognized that risk. Therefore, the Ninth Circuit improperly defined the substantial similarity test when the court held that the substantial similarity between the Bratz dolls and the sketches made by Carter Bryant should have been considered from the perspective of the "ordinary observer" instead of the "intended audience" of the dolls, children.

**IV. THE "INTEDED AUDIENCE TEST" HAS BEEN ADOPTED BY THE SECOND, THIRD, FOURTH, SIXTH, AND NINTH FEDERAL CIRCUITS WHEN THE WORKS IN DISPUTE ARE INTENDED FOR SPECIALIZED AUDIENCES**

The second prong of the substantial similarity test requires the trier of fact to determine substantial similarity from the perspective of the "ordinary observer." This prong has been interpreted by the Second, Third, Fourth, Sixth, and Ninth Federal Circuits to conduct the "ordinary observer" analysis from the perspective of the works "intended audience." Where the "intended audience" of the works at issue is more specialized or unique, than the "ordinary observer," the determination of substantial similarity is more relevant from the perspective of the

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<sup>58</sup> Aliotti v. R. Dakin & Co., 831 F.2d 898, 901 (9th Cir. 1987).

“intended audience.”<sup>59</sup> Although, the “ordinary observer” might find the works at issue substantially similar, the intended purchaser of the works might not. Therefore, without consideration of the works’ audience, the “substantial similarity test” is rendered meaningless. These determinations by the trier of fact have far reaching impacts on the competitive market and on creator’s rights. The purpose of copyright law is to protect a creator's market; and unless the analysis of substantial similarity is conducted through the viewpoint of the “intended audience,” protection afforded would be inconsistent with the markets needs.<sup>60</sup>

The Fourth Circuit established in *Dawson v. Hinshaw Music Inc.* (“*Dawson*”) the application of the “intended audience test” holding, “if lay public fairly represents “intended audience,” then court should supply lay observer formulation of ordinary observer test; however, if “intended audience” is more narrow or has specialized expertise that lay people would lack, the court should focus on that more narrow audience.”<sup>61</sup> The Fourth Circuit clarified in *Dawson* that the decision did not change the rule but clarified the application of the “ordinary observer test.”<sup>62</sup> The court explained the change in the approach was driven by “the effect of the defendant's work on the plaintiff's market and the practical evil of having an unaided uninformed finder of fact deciding the crucial issue in a case.”<sup>63</sup> Therefore, the Fourth Circuit in *Dawson* held that the District Court erred in not applying the “intended audience test” when determining

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<sup>59</sup> See *Dawson v. Hinshaw Music Inc.*, 905 F.2d 731, 734 (4th Cir. 1990) [hereinafter *Dawson*]. William L. Dawson brought action against Gilbert M. Martin and Hinshaw Music, Inc. for copyright infringement of spiritual “Ezekiel Saw De Wheel.”

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 736.

<sup>62</sup> *Id.* at 737.

<sup>63</sup> *Id.*



whether Dawson's and the defendant's spiritual musical arrangements were substantially similar from the perspective of choral directors.<sup>64</sup>

In *Lyons Partnership, L.P. v. Morris Costumes, Inc.*, (“*Lyons*”) the Fourth Circuit reaffirmed the application of the “intended audience test” when the court reversed the District Court's order granting summary judgment for the defendant, because the court failed to evaluate the works from a child's perspective.<sup>65</sup> The Fourth Circuit stated that the determination of substantial similarity between the defendants “Duffy purple dinosaur costume and the plaintiff's copyright on Barney should have been conducted from the perspective of a child.”<sup>66</sup> The *Lyons* court explained that works made for children required the application of the “intended audience test” because children possessed “specialized expertise, relevant to the purchasing decision, that lay people would lack.”<sup>67</sup> The court referred to testimony by an elementary school administrator in support of this determination.<sup>68</sup> The elementary school administrator testified that because Barney exemplified the qualities that the rally intended to communicate, the school rented, and she wore, the Duffy costume for a school rally called “Character Counts.”<sup>69</sup> The administrator explained that when she “appeared without advance notice before 500 children in the Duffy costume, the children saw Barney and ‘just went wild.’”<sup>70</sup> The administrator stated that the “children went crazy and they were just going, ‘Barney. Barney. Barney.’”<sup>71</sup> As the Fourth Circuit held, this evidence of actual confusion among children demonstrates the need for

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<sup>64</sup> *Dawson v. Hinshaw Music Inc.*, 905 F.2d 731, 738 (4th Cir. 1990) (“There is no reason for Dawson to submit recordings to persuade a lay listener that the arrangements are substantially similar if the lay listener's conclusion would not reflect the response of the choral directors who would purchase one arrangement over another on the basis of the arrangement's sheet music.”).

<sup>65</sup> *Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 802 (4th Cir. 2001).

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

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

<sup>68</sup> *Id.*

<sup>69</sup> *Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 802 (4th Cir. 2001).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

perceiving works intended for children from the perspective of children, when determining substantial similarity.<sup>72</sup> The “ordinary observer” test is clearly inadequate, because when perceiving the Duffy costume from an adults standpoint the “ordinary observer” may not have seen Barney just a simple purple dinosaur costume, however, as the testimony indicates the children unquestionably saw Barney when the administrator entered the stage. Therefore, when the works at issue are intended for children, substantial similarity must be determined from the perspective of a child to protect the market that the alleged infringing product is about to enter; since their perspective is much more indicative of the products effect on the market. The Sixth Circuit further supports the Fourth Circuits application of the “intended audience test” when the works at issue are intended for specialized audiences.

In *Kohus v. Mariol* (“Kohus”) the Sixth Circuit held that the District Court erred when the court failed to consider substantial similarity from the perspective of the “intended audience.”<sup>73</sup> The court in *Kohus* explained that the inquiry in the second prong of the “substantial similarity test” should focus on the “intended audience,” which will ordinarily be the lay public; however, “where the audience for the work possesses specialized expertise that is relevant to the purchasing decision and lacking in the lay observer, the trier of fact should make the substantial similarity determination from the perspective of the ‘intended audience.’”<sup>74</sup> In *Kohus* the circuit court found that the works at issue, drawings of latches for children’s portable play-yards, was a rare case “where the ‘intended audience’ is not the lay public: the drawings are technical and...interpretational guidance is needed for the lay viewer to imagine the structure and function of the device that the drawings depict; and the initial purchasers of the device would be trained

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<sup>72</sup> *Id.*

<sup>73</sup> *Kohus v. Mariol*, 328 F.3d 848, 858 (6th Cir. 2003).

<sup>74</sup> *Id.* at 857 (citing *Lyons P'ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 802 (4th Cir. 2001)).

engineers, capable of discerning technical niceties that the ordinary person would not detect, and likely to base their purchasing decision on such details.”<sup>75</sup> Therefore, the Sixth Circuit explained that where the target audience possesses specialized expertise, it is appropriate to consider similarity from the specialist's perspective although; the specialist's perception of similarity may be much different from the lay observer's.<sup>76</sup> In support of the application of the “intended audience test” the circuit court explained that, “the ordinary observer test is based on the economic incentive view of copyright law, that the “purpose of the copyright laws [is to] provid[e] creators with a financial incentive to create for the ultimate benefit of the public.”<sup>77</sup> The most effective way to provide an incentive is to determine substantial similarity from the perspective of the purchasers, who may retain more specialized knowledge or a narrower viewpoint than the ordinary observer.<sup>78</sup> Therefore, the “intended audience test” is most applicable when the works at issue are intended for a narrow audience, like engineers, children, or computer programmers. The Third Circuit agrees with the Sixth, and Fourth Circuits and has adopted the “intended audience test.”

In *Whelan Associates, Inc. v. Jaslow Dental Lab, Inc.* (“*Whelan*”) the Third Circuit held that the ordinary observer test is not useful and is potentially misleading when “the subjects of the copyright are complex, such as computer programs.”<sup>79</sup> The Third Circuit held that Jaslow Dental Lab, Inc. infringed on Whelan Associates, Inc. copyright when the Jaslow Dental Lab, Inc. developed and sold copies of a substantially similar dental record keeping computer program

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<sup>75</sup> *Id.* at 858.

<sup>76</sup> *Id.* at 857.

<sup>77</sup> *Id.* at 856 (citing *Dawson v. Hinshaw Music, Inc.*, 905 F.2d 731, 733 (4th Cir. 1990)).

<sup>78</sup> *Kohus v. Mariol*, 328 F.3d 848, 857 (6th Cir. 2003).

<sup>79</sup> *Whelan Associates, Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1233 (3d Cir. 1986) [hereinafter *Whelan*].

Whelan Associates, Inc. had custom-made for the Jaslow Dental Lab, Inc.<sup>80</sup> Affirming the District Court's award of damages and injunction against Jaslow Dental Lab, Inc., the Third Circuit explained that District Court properly relied on expert testimony in its determination of the substantial similarity and finding of copyright infringement.<sup>81</sup> The Third Circuit recognized that the "intended audience" of the works was highly skilled and equipped with computer knowledge, and that knowledge of computers was extremely significant in determining the substantial similarity of the programs.<sup>82</sup> Therefore, the "reasonable observer" standard was not applicable.<sup>83</sup> The court announced that the, "lay observer test" was inappropriate "when the objects in question are intended for a particular, identifiable audience."<sup>84</sup> The *Whelan* court declared, that the Third Circuit was now "joining the growing number of courts which do not apply the ordinary observer test in copyright cases involving exceptionally difficult materials," and instead determining substantial similarity from the perspective of the "intended audience."<sup>85</sup> The Federal Circuit agreed with the Third Circuit in its application of the "intended audience test" when the works at issue are intended for a specialized audience.

The Federal Circuit in *Atari Games Corp. v. Nintendo of America Inc.* ("Atari Games") applied the extrinsic- intrinsic analysis.<sup>86</sup> The court held that when applying the intrinsic prong "in the context of computer programs, the "ordinary reasonable person" with the ability to

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<sup>80</sup> *Id.* at 1233 (3d Cir. 1986) (developer of custom computer program for dental laboratory record keeping brought copyright infringement action against dental laboratory, for whose benefit program was developed, and related parties, as result of development of another program with similar purpose in another computer language and distribution of both programs.").

<sup>81</sup> *Id.* at 1232 (The district court heard expert testimony...we believe that the district court applied an appropriate standard.").

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* (citing Michael Sitzer, Note, *Copyright Infringement Actions: The Proper Role for Audience Reactions in Determining Substantial Similarity*, 54 S.Cal.L.Rev. 385 (1981) (criticizing lay observer standard when objects in question are intended for particular, identifiable audiences)).

<sup>85</sup> *Id.* at 1233.

<sup>86</sup> *Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832, 844 (Fed. Cir. 1992)[hereinafter Atari Games].

intelligently respond to computer expression, is a computer programmer and the perspective from which the trier of fact should determine substantial similarity.<sup>87</sup> The Federal Circuit recognized that in cases where the product is intended for a specialized audience, the perspective from which the substantial similarity is determined must be from the viewpoint of the “intended audience.” Therefore, when determining the similarity between the two computer programs, the *Atari Games* court held the “ordinary reasonable” person is an individual with the ability to intelligently respond to the computer expression, which is a quality that “a lay observer” lacks.<sup>88</sup> Aligning with the rationale of the Fourth, Third and Federal Circuits, the Second Circuit also applied the “intended audience test” in copyright infringement involving specialized audiences.

In *Computer Associates Int'l, Inc. v. Altai, Inc.* the Second Circuit held that “in making its finding on substantial similarity with respect to computer programs, the trier of fact need not be limited by the strictures of its own lay perspective.”<sup>89</sup> The court explained that in “reality computer programs are . . . impenetrable by lay observers-whether they be judges or juries-and, thus . . . fall outside the category of works contemplated by those who engineered the *Arnstein v. Porter* test.”<sup>90</sup> The Second Circuit cited the District Court’s decision to demonstrate why the “intended audience test” was appropriate in place of the “ordinary observer” test: “in the context of computer programs, many of the familiar tests of similarity prove to be inadequate, for they

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<sup>87</sup> *Id.* at 844 (Fed. Cir. 1992) (citing *Johnson Controls, Inc. v. Phoenix Control Sys., Inc.*, 886 F.2d 1173, 1176 (9th Cir. 1989)). Nintendo of America Inc. brought action against Atari Games Corp for copyright infringement of its 10NES computer program by Atari Games Corp.’s Rabbit computer program. The Federal Circuit held that the district court correctly considered the intended audiences perspective and expert testimony when determining substantial similarity.

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

<sup>89</sup> *Computer Associates Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 713 (2d Cir. 1992) [hereinafter *Computer Associates*].

<sup>90</sup> *See id.* (alluding to the *Arnstein* test, which is the two-step substantial similarity analysis the Second Circuit adopted, requiring the trier of fact to determine in the second step whether the defendant copied the plaintiff’s work to such an extent that the “ordinary observer” would find unlawful appropriation).

were developed historically in the context of artistic and literary, rather than utilitarian, works.”<sup>91</sup>

The Second Circuit held that the expert testimony was invaluable and appropriately considered by the trier of fact in the District Court to determine substantial similarity.<sup>92</sup> The court asserted that the expert testimony by Dr. Davis' was instrumental in dismantling the intricacies of computer science so that the trier of fact could formulate and apply an appropriate rule of law.<sup>93</sup>

Without the expert testimony, the trier of fact would not have been able to understand the complexity of the computer programs at issue or adequately determine substantial similarity.<sup>94</sup>

The “ordinary reasonable person” does not have the knowledge that computer programmers have for the 10NES or the Rabbit computer programs, and the purpose of the substantial similarity test is to protect innovative creations and ideas from being stolen and used to create a similar product, which is then sent into the market to compete with the original. Therefore, without determining the “substantial similarity” from the perspective of the consumers who have a basic comprehension of the works at issue, the purpose of the substantial similarity the test is lost, because where the “intended audience” consumer of the 10NES & Rabbit computer programs may see a substantial similarity, the ordinary observer may not. It follows that “intended audience test” is the most effective method of measuring the economic loss if the defendant’s product is to enter the market. The Second Circuit further supported the application of the “intended audience test” in cases involving children as the “intended audience.”

In *Ideal Toy Corp. v. Fab-Lu, Limited* (“*Ideal Toy Corp.*”) the Second Circuit held that the District Court properly applied the “intended audience test” when determining whether the

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<sup>91</sup> *Computer Associates Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 713 (2d Cir. 1992) (citing *Computer Associates Int'l, Inc. v. Altai, Inc.*, 775 F. Supp. 544, 558 (E.D.N.Y. 1991).

<sup>92</sup> *See id.* (Second Circuit held that perspective of the “intended audience,” a computer programmer, was a properly and necessarily applied).

<sup>93</sup> *Computer Associates Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 714 (2d Cir. 1992).

<sup>94</sup> *See id.*

defendant's dolls, Randy and Mary Lou, were substantially similar to the plaintiff's Tammy and Pepper dolls.<sup>95</sup> The court in *Ideal Toy Corp.* explained that the "basic consumer appeal of the dolls is to youngsters," and "in applying the test of the average lay observer, they are... indeed the 'far-flung faithful audience.'"<sup>96</sup> The District Court found that the impression of the faces and general appearance of the dolls was directed at youngsters.<sup>97</sup> "The television advertising campaign of plaintiff was directed toward acquainting these youngsters with Tammy and Pepper, its new teenage and pre-teen dolls."<sup>98</sup> Therefore, District Court held, determining substantial similarity from a child's perspective provides the most accurate market affect of the defendant's work.<sup>99</sup> Rejecting the defendant's concession that the Mary Lou and Randy dolls were slavish copies of the Tammy and Pepper dolls, the District Court held that the crude workmanship did not hinder the affect of copyright infringement and that the body structures, size, and the features of the respective authentic and copied dolls were virtually identical.<sup>100</sup> The *Ideal Toy Corp.* court found that the slight differences, such as the neck construction, which were observable only upon a close and fine inspection, did not detract from their substantial similarity, particularly since the targeted audience was children.<sup>101</sup> The District Court announced, "it is the youngsters who, on the basis of this impression, go to the stores with their parents and purchase the dolls." "In their enthusiasm to acquire Tammy or Pepper the children are not bent upon minute disparities, such as the curve of a neck, to detract them from accepting a doll whose outward ordinary appearance

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<sup>95</sup> *Ideal Toy Corp. v. Fab-Lu Ltd. (Inc.)*, 360 F.2d 1021, 1022-23 (2d Cir. 1966) ("The district court correctly employed the ordinary observer test and, on the basis of the evidence before it, we cannot say that the denial of appellant's motion for a preliminary injunction as to the infringement claim constituted an abuse of discretion.").

<sup>96</sup> *Ideal Toy Corp. v. Fab-Lu, Ltd.*, 261 F. Supp. 238, 241 (S.D.N.Y. 1966).

<sup>97</sup> *See id.*

<sup>98</sup> *Id.* at 242.

<sup>99</sup> *Id.*

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

<sup>101</sup> *Id.*

is virtually identical.”<sup>102</sup> Therefore, the Southern District Court of New York and Second Circuit have held that the “intended audience test” should be applied when works at issue are intended for children.<sup>103</sup> The Ninth Circuit has followed the Fourth, Second, Third, Sixth and Federal Circuits in applying the “intended audience test” in copyright infringement cases where the products at issue are intended for a specialized audience like children.

The Ninth Circuit has routinely applied the “intended audience test” in cases where the products at issue were intended for children. In the landmark case of *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, the Ninth Circuit affirmed the District Court’s finding that McDonald’s Corp. infringed on the Krofft’s copyright of the H.R. Pufnstuf series when the corporation hired Krofft’s former employees, and used the voice expert who supplied the voices of Pufnstuf, for its campaign and commercial advertising of McDonaldland.<sup>104</sup> Sid and Marty Krofft were the creators of the H. R. Pufnstuf television series, which included several fanciful costumed characters and boy named Jimmy, who lived in a fantasyland called “Living Island,” inhabited by moving trees and talking books. The Ninth Circuit stated that to determine whether the defendant infringed on Kroffts copyright of the H.R. Pufnstuf the court must decide,

whether defendant took from plaintiff's works so much of what is pleasing to the (eyes and) ears of lay (persons), who comprise the audience for whom such popular (works are) composed, that defendant wrongfully appropriated something which belongs to the plaintiff. Surely, then, we have an issue of fact which a jury is peculiarly fitted to determine.<sup>105</sup>

Based on the citation above, it is evident the Ninth Circuit quantifies substantial similarity from the perspective of children when the works at issue are intended for children. The Ninth Circuit referred to the Second Circuit’s decision in *Ideal Toy Corp.* to support its application of the

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<sup>102</sup> *Id.*

<sup>103</sup> *See id.*

<sup>104</sup> *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1161 (9th Cir. 1977).

<sup>105</sup> *Id.* at 1165 (9th Cir. 1977)(citing *Arnstein v. Porter*, 154 F.2d 464, 472 (2d Cir. 1946).



“intended audience test,” asserting that because the works at issue were intended for children, the impact of the respective works upon the minds and imaginations of young people should be standard of review.<sup>106</sup> The Ninth Circuit rejected the defendant’s argument that the differences in the dress, mannerisms, colors and features of each character prevented a finding of substantial similarity, holding that the ordinary reasonable child “would not even notice that Pufnstuf is wearing a cummerbund while Mayor McCheese is wearing a diplomat's sash.”<sup>107</sup> The Ninth Circuits, substantial similarity analysis from the perspective of children in the landmark case of *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, demonstrates the circuits longstanding dedication to the “intended audience test.” The Ninth Circuit reaffirmed its finding that the “intended audience test” is applied in cases where the products at issue are intended for children in *Aliotti v. R. Dakin & Co.*

The Ninth Circuit in *Aliotti v. R. Dakin & Co.* (“*Alliotti*”) affirmed the District Courts grant of summary judgment for the defendants holding that R. Dankin & Co. did not infringe on Aliotti’s copyright of the “Ding-A-Saurs” line of stuffed toy dinosaurs, with the manufacture of its stuffed toy line called “Prehistoric Pets.”<sup>108</sup> The Ninth Circuits determination of substantial similarity was conducted from the perspective of children.<sup>109</sup> The *Alliotti* court held that “because children are the intended market for the dolls, ... the court must filter the intrinsic inquiry through the perception of children.”<sup>110</sup> The Ninth Circuit recognized that since the dispute was over the substantial similarity between stuffed dinosaurs intended for children, the court must

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<sup>106</sup> *Id.* at 1166 (9th Cir. 1977)(citing *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)).

<sup>107</sup> *Id.* at 1167 (9th Cir. 1977) (holding that the defendants works captured the “total concept and feel of the H.R. Pufnstuf show” and Sid and Mary Kroffts copyright).

<sup>108</sup> *Aliotti v. R. Dakin & Co.*, 831 F.2d 898 (9th Cir. 1987).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 902 (9th Cir. 1987) (citing *see Krofft*, 562 F.2d at 1166-67; *Ideal Toy Corp. v. Fab-Lu Ltd.*, 261 F.Supp. 238, 241-42 (S.D.N.Y.1966), *aff'd*, 360 F.2d 1021 (2d Cir.1966)).

disregard certain factors that may normally be considered in the determination of substantial similarity.<sup>111</sup> “Substantial similarity of expression cannot be established by the fact that both lines of dinosaurs are gentle and cuddly, given that stuffed animals are intended for children and are usually designed to be soft and non-threatening.”<sup>112</sup> The *Allioti* court found, there was no copyright infringement and that the grant of summary judgment was appropriate because upon *de novo* review the plaintiffs could find no similarity in expression “resulting from either the physiognomy of dinosaurs or from the nature of stuffed animals.”<sup>113</sup> Therefore, the Ninth Circuit held that no substantial similarity of protectable expression existed, as reasonable observer would not infer that defendant manufacturer's dolls captured total concept and feel of copyrighted designs, as perceived by children.<sup>114</sup>

The Ninth Circuit has consistently recognized the importance of the “intended audience test” in copyright infringement cases where the works at issue are intended for children.<sup>115</sup> However, in *Mattel v. MGA Entm't* the Ninth Circuit failed to determine the substantial similarity between the Carter Bryant's sketches and the Bratz doll collection from a child's perspective.<sup>116</sup> As demonstrated above, the Ninth Circuit recognizes the importance and determinative impact of deciding substantial similarity from the perspective of the “intended audience” when there is an identified audience for the products at issue. Therefore, it must be found that the Ninth Circuit improperly defined the intrinsic analysis in *Mattel v. MGA Entm't* when the court failed to announce substantial similarity should be determined from the perspective of the products “intended audience,” children.

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<sup>111</sup> *Id.* at 901 (9th Cir. 1987).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Data E. USA, Inc. v. Epyx, Inc.*, 862 F.2d 204, 210 (9th Cir. 1988) (karate computer games compared through the eyes of “a discerning 17.5 year old boy”)

<sup>116</sup> *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 914 (9th Cir. 2010), *amended on denial of reh'g* (Oct. 21, 2010).

V. **THE NINTH CIRCUIT IMPROPERLY DEFINED THE “SUBSTANTIAL SIMILARITY” TEST IN MATTEL V. MGA ENTM’T WHEN THE COURT HELD THAT SUBSTANTIAL SIMILARITY SHOULD BE DETERMINED FROM THE PERSPECTIVE OF THE “ORDINARY OBSERVER” AND NOT A CHILD, FAILING TO INCLUDE WITHIN THE “INTRINSIC ANALYSIS” THE “INTENDED AUDIENCE TEST”**

The Ninth Circuit in *Mattel v. MGA Entm’t* applied the “extrinsic” and “intrinsic” test to determine the substantial similarity between the Bryant’s sketches and MGA’s Bratz dolls.<sup>117</sup> After separating out the unprotectable features of Bryant’s sketches the Ninth Circuit explained that the District Court properly awarded broad copyright protection to the sketches since, “there is a wide range of expression for *complete* young, hip female fashion dolls with exaggerated features.”<sup>118</sup> The Ninth Circuit found that because designers may vary the face paint, hair color, hair-style, clothing, accessories and alter the sculpt of the dolls, there is a broad range of expression for complete female fashion dolls.<sup>119</sup> Therefore, the assignment of broad copyright protection was appropriate.<sup>120</sup> However, the Ninth Circuit found that the District Court erred when it assigned broad copyright protection to Bryant’s preliminary sculpt.<sup>121</sup> The court found that dolls depicting young, fashion-forward females require idealized proportions-which means slightly larger heads, eyes and lips; slightly smaller noses and waists; and slightly longer limbs than those that appear routinely in nature.<sup>122</sup> Since, these features can be can be exaggerated to a limited extent; “Make the head too large or the waist too small and the doll becomes freakish, not idealized,” the Ninth Circuit found only a narrow range of expression is available for doll sculpts

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<sup>117</sup> *Id.* at 913.

<sup>118</sup> *Mattel, Inc. v. MGA Entm’t, Inc.*, 616 F.3d 904, 916 (9th Cir. 2010), *amended on denial of reh’g* (Oct. 21, 2010)(Finding that although sculpts are typically awarded thin copyright protection because there is a limited number of ways to depict over-sized features, the court held, overall there is a wide range of choices for complete, young, hip fashion dolls to be expressed).

<sup>119</sup> *Id.* (Requiring Mattel to show that the Bratz dolls are substantially similar to Bryant’s sketches disregarding similarities in unprotectable ideas to justify a copyright injunction).

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

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

<sup>122</sup> *Id.*

depicting fashion-forward females.<sup>123</sup> Thus, the *Mattel* court found that thin copyright protection was the appropriate standard.<sup>124</sup> Next, the Ninth Circuit examined the substantial similarity between Bryant's sketches and MGA's manifestation of those sketches in the Bratz doll collection.<sup>125</sup> The Court announced that for the trier of fact to find that MGA infringed on Mattel's copyright of Bryant's sketches, the trier of fact must find the "ordinary observer" would find the sketches and Bratz dolls substantially similar.<sup>126</sup>

The Ninth Circuit held that the District Court erred in finding that the entire Bratz doll collection was substantially similar to Bryant's sketches.<sup>127</sup> The court explained that the Bratz dolls could not be considered substantially similar to Bryant's preliminary sketches simply because the dolls and sketches depict young, stylish girls with big heads and an attitude since the collections later generations did not reflect the fashions and hairstyles in those drawings.<sup>128</sup> The *Mattel* court then continued to explain that copyright protection is only afforded to the expressions of ideas, and not *ideas themselves*, therefore, the District Court's rationale that the depiction of young fashion-forward females with the same oversized features constituted

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.* (requiring Mattel will have to show that the Bratz sculptures are virtually identical to Bryant's preliminary sculpt to justify an copyright injunction).

<sup>125</sup> *Id.*

<sup>126</sup> *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 917 (9th Cir. 2010), *amended on denial of reh'g* (Oct. 21, 2010)(Citing *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994)) (declaring that the standard for infringement-substantially similar or virtually identical-determined at the "extrinsic" stage is applied at the "intrinsic" stage, where the trier of fact determines whether an ordinary reasonable observer would consider the copyrighted and challenged works substantially similar (or virtually identical)).

<sup>127</sup> *Id.* (reversing the District Court's injunction and constructive trust prohibiting MGA from producing or marketing virtually every Bratz female fashion doll, as well as any future dolls substantially similar to Mattel's copyrighted Bratz works. The injunction covered not just the original four dolls, but also subsequent generations (e.g., "Bratz Slumber Party Sasha" and "Bratz Girlfriendz Nite Out Cloe") and other doll characters (e.g., "Bratz Play Sportz Lilee" and "Bratz Twins Phoebe and Roxxi")).

<sup>128</sup> *Id.* (reversing the District Court's finding that the Bratz doll collection was substantially similar, finding "that it might have been reasonable to hold that *some* of the Bratz dolls were substantially similar to Bryant's sketches, especially those in the first generation. But we fail to see how the district court could have found the vast majority of Bratz dolls, such as "Bratz Funk 'N' Glow Jade" or "Bratz Wild Wild West Fianna," substantially similar-even though their fashions and hair styles are nothing like anything Bryant drew-unless it was relying on similarities in ideas.").

substantial similarity was improper.<sup>129</sup> The Ninth Circuit referenced its decisions in *Aliotti v. R. Dakin & Co.* and *Data E. USA, Inc. v. Epyx, Inc.* to explain how the works at issue might share an idea, and be similar in the “layman’s” sense of the term, however that is not the sort of similarity the trier of fact looks for to determine copyright infringement.<sup>130</sup> To support this contention the Ninth Circuit specifically quoted a section of its decision in *Aliotti* where the court held the trier of fact should not consider the stuffed and cuddly nature of the toys in determining substantial similarity.<sup>131</sup> However, the Ninth Circuit’s reliance on these cases, and that particular section of the decision is misplaced since the *Aliotti* court’s reasoning was founded in the rationale that the determination of substantial similarity was from the perspective of the toys “intended audience,” children.

In *Aliotti v. v. R. Dakin & Co* the Ninth Circuit required the trier of fact to ignore the stuffed and cuddly nature of the works at issue because their “intended audience” was children, therefore, those aspects of the works are common in that industry and should not be considered when determining substantial similarity.<sup>132</sup> The *Aliotti* Court found that to include those characteristics in the consideration of substantial similarity would be unfair in ensuring a creative but competitive market. The *Mattel* courts reliance on this case in supporting its contention was improper and odd since it diverged from the substantial similarity test employed in *Aliotti*.<sup>133</sup> However, the Ninth Circuits citation to *Aliotti* and *Data East* reveals the *Mattel* court’s intention

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<sup>129</sup> *Id.* (holding that the consistency of the particularized expression of the dolls’ heads, lips, eyes, eyebrows, eye features, noses, as well as the particularized expression of certain anatomical features relative to others ... and de-emphasis of certain anatomical features demonstrated is not enough to constitute substantial similarity).

<sup>130</sup> *Id.* at 917.

<sup>131</sup> *Id.* at 917 (9th Cir. 2010), *amended on denial of reh’g* (Oct. 21, 2010) (citing *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 901 (9th Cir. 1987) (“Substantial similarity of expression cannot be established by the fact that both lines of dinosaurs are gentle and cuddly, given that stuffed animals are intended for children and are usually designed to be soft and nonthreatening.”)).

<sup>132</sup> *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 901 (9th Cir. 1987).

<sup>133</sup> *Mattel*, *supra* note 123, at 917 (applying the extrinsic/ intrinsic test developed by the *Apple Computer Inc. v. Microsoft Corp.*).

to defer or rely on cases involving products intended for children when the case in dispute involves works intended for children. Therefore, since the *Mattel* court did cite two cases involving products intended for children, and both the cases cited applied the “intended audience test,” the Ninth Circuit should have held that in the “intrinsic analysis” the trier of fact should determine substantial similarity from the perspective of a child and not the “ordinary reasonable observer.”

The Second Circuit in *Ideal Toy Corp.*, held that the District Court properly applied the substantial similarity when the court determined substantial similarity from the perspective of a child, holding that, it is the youngsters who go to the stores with their parents and purchase the dolls and in their enthusiasm, children will not be detracted from purchasing by minute disparities of a doll whose outward ordinary appearance is virtually identical.<sup>134</sup> Therefore, the Second Circuit held the “intended audience test” is most appropriate when the works at issue are intended for children.<sup>135</sup> When the “intended audience” is children, certain considerations must be made that adults would not take into account. For instance, adults who collect dolls would most likely be more meticulous in discerning which dolls they want since it can be assumed their reasons for purchasing the items different than children’s intended use. For instance, adults collect dolls, whereas children play with them. Therefore, a difference in the curve of the neck, like in *Ideal Toy Corp.*, would be more of a deterrent for an adult purchasing a toy, than for a child. These considerations are especially significant in *Mattel v. MGA Entm’t* since the works at issue are sketches and dolls. Determining the similarity of the works at issue from the perspective of a child alters the landscape of the factors considered. The sketches of the Bratz dolls were made to design a toy for children and the complete Bratz dolls were sold to children.

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<sup>134</sup> *Ideal Toy Corp. v. Fab-Lu, Ltd.*, 261 F. Supp. 238, 242 (S.D.N.Y. 1966).

<sup>135</sup> *Id.*

The Ninth Circuit held that on remand the trier of fact must determine whether the features of the sculpt are “virtually identical “ and whether the complete Bratz doll collection is substantially similar to Bryant’s sketches from the perspective of a child. If the trier of fact had determined Mattel was entitled to the copyright, the trier of fact would have necessarily conducted the substantial similarity test. Failure to apply the “intended audience test” may have improperly found that the dolls were infringing on Mattel’s copyright and prevented the copyright law from attaining its aim, which is to foster creativity while maintaining a competitive market place. The substantial similarity test would have been extremely important in determining the substantial similarity in the sculpt of the dolls. Like in *Ideal Toy Corp.*, the trier of fact must have determined whether a child would have found the sculpt of the doll was “virtually identical.”<sup>136</sup> If the trier of fact had determined whether the sculpt was “virtually identical” from the “perspective of the ordinary observer” the decision may come out a different way, not taking into account the actual affect the infusion of these dolls will have on the children’s doll market. Therefore, the Ninth Circuit should have held in *Mattel v. MGA Entm’t* that substantial similarity be determined from the perspective of a child.

The perspective of an adult and child are different, and applying the “ordinary observer” test does not account for how children will perceive the product. In *Lyons v. Morris Costumes, Inc.*, the Fourth Circuit held that children possess “specialized expertise, relevant to the purchasing decision, that lay people would lack.”<sup>137</sup> The school administrator’s testimony “children went crazy shouting, ‘Barney. Barney. Barney.’” assuming she was Barney when she dressed in a purple dinosaur suit demonstrated the actual confusion among children and need for determining substantial similarity for works intended for children from the perspective of children. As the

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<sup>136</sup> *Id.*

<sup>137</sup> *Lyons P’ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 802 (4th Cir. 2001).

case law in the Second, Third, Sixth, and Ninth Federal Circuit Courts show, the “ordinary observer test” is an inadequate perspective for determining substantial similarity when the works at issue are intended for children. Furthermore, the Ninth Circuit did not apply the “the total concept and feel of the works” test, which the Ninth Circuit has applied in the majority of its cases prior to the *Apple Computer Inc. v. Microsoft Corp.* test.<sup>138</sup> As discussed in section “II” the Ninth Circuit’s extrinsic/intrinsic analysis place relies on the trier of fact’s determination of whether copyright infringement occurred. Therefore it is imperative that the scope of the decision-making is narrowed so that the decision accurately reflects the actual affect of the defendant’s product on the market. The “intended audience test” achieves this goal, especially when the works at issue are intended for children. Not only are children’s perspectives much different than those of adults, but their market heavily relies on the appearance of the works. Functionality is sometimes important for children’s works, but particularly with dolls, like in *Mattel v. MGA Entm’t*, appearance is crucial. Therefore, the Ninth Circuit should have directed the District Court to instruct the trier of fact that copyright infringement could only be found if a child would find Bryant’s sketches and the Bratz sculptors “virtually identical” in their “total concept and feel” or only if a child would find Bryant’s sketches and the complete Bratz dolls substantially similar in their “total concept and feel.” Nevertheless, no matter what new test the Ninth Circuit applies to find copyright infringement, the court must always determine substantial similarity from the perspective of child when the works at issue are intended for children.

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<sup>138</sup> *Shaw v. Lindheim*, 919 F.2d 1353, 1355 (9th Cir. 1990); *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.* (holding that the defendants works captured the “total concept and feel of the H.R. Pufstuf show” and Sid and Mary Kroffts copyright); ); *Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir.2002).



## CONCLUSION

To maintain a creative and competitive market for children's toys, copyright infringement should always be determined from the perspective of a child when the works at issue are intended for children. The Ninth Circuit improperly defined the intrinsic/ extrinsic test when the court failed to include the "intended audience test" within the intrinsic analysis. Determining copyright infringement from the perspective of the "intended audience" ensures that the affect of the defendant's product on the market it enters is appropriately analyzed. Not accounting for the perspective of the potential purchasers contravenes the aim of copyright law, which is to foster creativity while still allowing for a competitive market. This is particularly true in the market of children's toys since as case law shows, children are a driving force in the market place and are the audience many industries target. Their reactions to products are different than those of "ordinary observer." Therefore, to protect the aim of copyright law and the accuracy of the "substantial similarity" test the Ninth Circuit must apply the "intended audience test," when the works at issue are intended for children, and should have held in the *Mattel v. MGA Entm't* decision that the intrinsic analysis be conducted from the perspective of a child, the Bratz dolls' "intended audience."