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## The Copyright Infringement Test: A New Approach to Literary Misappropriation in Film

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## The Copyright Infringement Test: A New Approach to Literary Misappropriation in Film

### Abstract

This Note argues that courts' emphasis on the ordinary observer test to prove illicit copying in film is misguided. The ordinary observer test relies on whether the accused work captures the total feel of the copyrighted work, but overlooks an essential aspect of unlawful appropriation and copyright law – the idea that only particular elements of a work are copyrightable. If a jury is exposed to expert testimony regarding probative similarity before making their evaluation, it is unlikely they will forget such evidence when evaluating the illicit copying.

A better test for infringement would be one that allows the ordinary observer, representative of the intended audience, to detect whether there is a similarity in the works, exclusive of an expert's opinion. The focus should then shift to the more complicated issue of unlawful appropriation by permitting the inclusion of analytic dissection and expert testimony.

### Keywords

copyright infringement, misappropriation, film

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*Note*

**The Copyright Infringement Test:  
A New Approach to Literary  
Misappropriation in Film**

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**Abstract**

This Note argues that courts’ emphasis on the ordinary observer test to prove illicit copying in film is misguided. The ordinary observer test relies on whether the accused work captures the total feel of the copyrighted work, but overlooks an essential aspect of unlawful appropriation and copyright law – the idea that only particular elements of a work are copyrightable. If a jury is exposed to expert testimony regarding probative similarity before making their evaluation, it is unlikely they will forget such evidence when evaluating the illicit copying.

A better test for infringement would be one that allows the ordinary observer, representative of the intended audience, to detect whether there is a similarity in the works, exclusive of an expert’s opinion. The focus should then shift to the more complicated issue of unlawful appropriation by permitting the inclusion of analytic dissection and expert testimony.

**Table of Contents**

INTRODUCTION..... 531

I. BACKGROUND AND OVERVIEW OF INFRINGEMENT  
IN MOTION PICTURES..... 536

II. PROVING COPYRIGHT INFRINGEMENT..... 539

    A. *The Two-Step Test*..... 539

        1. Copying..... 540

        2. Improper Appropriation..... 541

    B. *The Ordinary Observer in Film* ..... 545

III. COPYRIGHT INFRINGEMENT COMPARED TO  
TRADEMARK..... 550

IV. PROPOSED SOLUTIONS ..... 555

CONCLUSION..... 557

“[A]s a matter of triable fact, . . . there are only twenty-nine basic plot ideas in the world.”<sup>1</sup>

### INTRODUCTION

All writers think that their ideas are unique, and no single writer is usually willing to admit that the same idea can be independently thought of twice. For this reason, copyright infringement suits are quite popular in Hollywood. However, for this very same reason, an overwhelming amount of such suits fail.<sup>2</sup>

To prove copyright infringement, the Second Circuit test requires that the claimant show, (1) ownership of the copyright, (2) that the defendant copied from claimant’s copyrighted work, and (3) that the copying constitutes improper, or unlawful appropriation.<sup>3</sup> Ownership is a “statutory formality,” which is easily satisfied.<sup>4</sup> However, proving that the defendant copied a copyrighted work as a matter of fact, which may consist of evidence of admission by the defendant or circumstantial evidence of access to the work, is more involved.<sup>5</sup> Thus, factual copying

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<sup>1</sup> Nick Gladden, *When California Dreamin’ Becomes a Hollywood Nightmare; Copyright Infringement and the Motion Screenplay: Toward an Improved Framework*, 10 J. INTELL. PROP. L. 359, 360 (2003) (quoting RON SUPPA, *THE BUSINESS OF SCREENWRITING* 66 (1999)).

<sup>2</sup> *Id.*

<sup>3</sup> *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946); 17 U.S.C. §§ 106, 501 (2012).

<sup>4</sup> See Gladden, *supra* note 1 (noting registration of a copyright is a prerequisite to copyright infringement, but the requirements for registration are minimal: the registered work may simply be an independent creation of the copyright owner).

<sup>5</sup> *Arnstein*, 154 F.2d at 468-69.

involves proof of similarity, in addition to access.<sup>6</sup>

Access is established if there was a reasonable opportunity to view the copyrighted work, as “[i]t is obvious that one cannot copy a work unless he reads, sees, or hears it,” thus establishing a reasonable inference of copying.<sup>7</sup> However, access alone will not suffice if no similarities between the two works exist.<sup>8</sup> Once access and similarities have been established, an analysis is required to determine whether such similarities necessarily prove copying.<sup>9</sup> Here, expert testimony is permitted to aid the trier of facts.<sup>10</sup> Furthermore, unless the similarities are “striking,” an absence of access will usually preclude a finding of copying.<sup>11</sup>

Nonetheless, the more complex issue tends to fall within the third part of the Second Circuit’s test for copying: that of unlawful appropriation.<sup>12</sup> The unlawful appropriation standard for screenplays currently remains somewhat underdeveloped.<sup>13</sup> However, in considering what constitutes an illicit copying, courts apply the test of the ordinary observer.<sup>14</sup> For sufficient actionable appropriation, a film must “leave the impression it was based on or used plaintiff’s work” from the point of view of the average per-

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<sup>6</sup> *Id.*

<sup>7</sup> M.L. Cross, *Literary and Artistic Rights for Purposes of, and Their Infringement by or in Connection with, Motion Pictures, Radio, and Television*, 23 A.L.R.2d 244, § 28(a) (1952); *Arnstein*, 154 F.2d at 468.

<sup>8</sup> *Arnstein*, 154 F.2d at 468.

<sup>9</sup> *Id.*

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

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See Gladden, *supra* note 1.

<sup>14</sup> *Arnstein*, 154 F.2d at 468.

son.<sup>15</sup>

This Note argues that the courts appear to allow expert testimony where none is needed, but then exclude such testimony where it is necessary. According to Judge Learned Hand, copying is illicit where “the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them.”<sup>16</sup> If a jury is exposed to expert testimony regarding probative similarity, it is unlikely they will forget such evidence when evaluating the illicit copying. The ordinary observer test relies on whether the accused work captures the “total concept and feel” of the copyrighted work.<sup>17</sup> The “total concept and feel” overlooks an essential aspect of unlawful appropriation and copyright law – only particular elements of a work are copyrightable.<sup>18</sup>

One reason for the lack of successful suits against movie studios is the fact that many suits are misguided, and the parties alleging infringement do not necessarily understand how to dissect an unlawful appropriation.<sup>19</sup> A better test for infringement would be one that allows the ordinary observer, representative of the intended audience, to detect whether there is a similarity in the works, exclusive of an expert’s opinion. The focus should then shift to the more complicated issue of unlawful appropriation

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<sup>15</sup> Cross, *supra* note 7, at § 2[b].

<sup>16</sup> Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC’Y U.S.A. 719, 727 (2010) (quoting *Arnstein*, 154 F.2d at 468).

<sup>17</sup> Sid & Marty Krofft Television Productions, Inc. v. McDonald’s Corp., 562 F.2d 1157, 1167 (9th Cir. 1977).

<sup>18</sup> See 17 U.S.C. § 102(b) (2012).

<sup>19</sup> K.J. Greene, *Motion Picture Copyright Infringement and the Presumption of Irreparable Harm: Toward a Reevaluation of the Standard for Preliminary Injunctive Relief*, 31 RUTGERS L.J. 173, 182 (1999); Lemley, *supra* note 16, at 719.

by permitting the inclusion of analytic dissection and expert testimony. Although a layperson may easily detect an overall similar theme, the separation of copyrightable material and elements should be detected by expert testimony, or perhaps is better analyzed as a matter of law.

Furthermore, the qualifications of the ordinary observer have been a source of dissent.<sup>20</sup> Can the average moviegoer truly differentiate between an original and unoriginal work? Is the lay observer equipped to differentiate between protectable and unprotectable elements of a copyright? Does the lay observer understand that copyright protection does not “extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied?”<sup>21</sup> Should the courts allow expert testimony of dramaturges and literary agents, or does that make the infringement too trivial to be actionable?

Comparatively, trademark infringement cases rely on consumer confusion and the judgment of the reasonably prudent purchaser to determine actionable infringement.<sup>22</sup> The reasonably prudent purchaser is akin to the ordinary observer in copyright infringement cases. However, a reasonably prudent

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<sup>20</sup> Cross, *supra* note 7, at § 28(a).

<sup>21</sup> 17 U.S.C. § 102(b) (2012).

<sup>22</sup> See *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961) (setting forth the 8-factor test for consumer confusion, which includes: (1) Strength of the mark; (2) Proximity of the goods; (3) Similarity of the marks; (4) Evidence of actual confusion; (5) Marketing channels used; (6) Type of goods and the degree of care likely to be exercised by the purchaser; (7) Defendant’s intent in selecting the mark; (8) Likelihood of expansion of the product lines).

purchaser watching a film can easily identify the product, and thereby any confusion as to the origin of the product is more explicit than the confusion of an ordinary observer identifying copyright infringement, where she must be told that there is an issue of authorship or copyright ownership.

Alternatively, copyright infringement in film requires the “ordinary observer” to be highly knowledgeable about the art of filmmaking. The complexities involved in making a film set it apart from the art of music and literature, which also employs the ordinary observer test.<sup>23</sup> Where the expression of music is analyzed by patterns of notes, film employs multiple mediums, which may cause confusion for the ordinary observer in identifying the copyrightable elements.

The court employs the ordinary observer test to determine copyright infringement in film through the “eyes of men generally.”<sup>24</sup> Yet, this test is flawed because the average observer of a movie is not accurately represented if they are influenced by expert testimony initially. Furthermore, the ordinary observer is not necessarily one who can properly differentiate between what may and may not be copied. The confusion of the observer watching a film should relate to the question of whether similarities of copyrightable material exist. Courts should therefore allow extrinsic evidence of experts to support the testimony of the “average” quasi-expert that make up

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<sup>23</sup> The medium of computer software, which is also covered under the Copyright Act, will not be addressed as I intend to focus on mediums that employ artistic expression.

<sup>24</sup> See *Gorham Mfg. Co. v. White*, 81 U.S. 511, 528 (1871) (establishing that the “ordinary observer” test is the judgment of a design, which is to be made by men generally “of ordinary intelligence”).

the juries of the Ninth and Second Circuits.

## I. BACKGROUND AND OVERVIEW OF INFRINGEMENT IN MOTION PICTURES

Article I, Section 8 of the United States Constitution grants Congress the power to enact copyright legislation in order to promote and protect the works of authors.<sup>25</sup> The Copyright Act, codified in 17 U.S.C., vests protection “in original works of authorship fixed in any tangible medium of expression” and lists “motion pictures” as a category to be protected.<sup>26</sup> The owner of a copyright has the exclusive right to reproduce the copyrighted work, prepare derivative works, distribute copies, and perform or display the work publicly.<sup>27</sup>

By way of limitation, 17 U.S.C. § 102(b) specifies that protection will not extend to any “idea, procedure, process, system, method of operation, concept, principle, or discovery.”<sup>28</sup> Thus, in the seminal case *Baker v. Selden*, the Supreme Court found that expression of ideas, not the ideas themselves, could be copyrighted.<sup>29</sup> This is where the ordinary observer test becomes somewhat complicated. In *Baker*, plaintiff alleged copyright infringement of his book that consisted of a unique double entry bookkeeping system made up of a particular arrangement of columns. Defendant’s book used a similar system with

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<sup>25</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>26</sup> 17 U.S.C. § 102 (2012).

<sup>27</sup> 17 U.S.C. § 106 (2012).

<sup>28</sup> 17 U.S.C. § 102(b) (2012).

<sup>29</sup> *Baker v. Selden*, 101 U.S. 99, 103 (1879) (“The description of the art in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the art itself. The object of the one is explanation; the object of the other is use. The former may be secured by copyright.”).

a different arrangement of columns.<sup>30</sup> The court ruled that defendant was free to use the art of the system described in the book, as long as the book itself was not copied.<sup>31</sup> The court acknowledged that, although the system of the art described in the book may be protected, no exclusive claim existed in the art of the system itself.<sup>32</sup>

The idea/expression dichotomy is particularly important in the business of Hollywood filmmaking. Even more so, the idea/expression dichotomy creates complications for the ordinary observer in identifying copyright infringement. Producers are at liberty to find an idea and quickly make a motion picture on the same subject or idea.<sup>33</sup> Although copyright law assumes that the author will be the owner of the work, generally, in Hollywood, the author sells his idea and assigns all his rights to a producer who creates the expression.<sup>34</sup> Nonetheless, directors and producers will be held contributorily or vicariously liable.<sup>35</sup>

The complication of the idea/expression dichotomy is partly attributed to the complexity of a making a Hollywood film. Hollywood films are arguably the single most expensive art of modern times.<sup>36</sup> The phases of creation include pre-production, production, post-production, and distribution, with hundreds of negotiations contracted for each phase, producing hundreds of additional transaction costs. Due to these costs, only one in ten motion pictures will

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<sup>30</sup> *Id.* at 100.

<sup>31</sup> *Id.* at 105.

<sup>32</sup> *Id.*

<sup>33</sup> Cross, *supra* note 7, at § 13.

<sup>34</sup> Greene, *supra* note 19, at 178.

<sup>35</sup> *Id.* at 179.

<sup>36</sup> *Id.* at 180.

ever yield a profit.<sup>37</sup> Because of the risk and expense involved in creating a movie, production companies usually spend millions of dollars on “clearance experts” who will calculate the risk of potential legal action surrounding any infringement risks.<sup>38</sup>

Yet, despite such efforts, copyright infringement suits continue to be brought in large numbers.<sup>39</sup> This is because writers tend to believe in the originality of their ideas, failing to understand that an idea is not cause for a claim of copyright infringement.<sup>40</sup> If the creator of the art is confused as to what is copyrightable and what is not, won’t the ordinary observer feel similarly if not more confused?

Litigation related to motion pictures can arise based on theories of law ranging from contract, to trademark, to right of publicity. Yet, the most popular of the claims tends to be based on copyright infringement.<sup>41</sup> The allure of suing the makers of Hollywood films is apparent: lots of equity and the great fear of bad publicity. Nevertheless, actions against motion pictures rarely ever succeed.<sup>42</sup> Possible rea-

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 180.

<sup>39</sup> *Id.* at 180-81.

<sup>40</sup> 17 U.S.C. § 102(b) (2012).

<sup>41</sup> Greene, *supra* note 19, at 180-81.

<sup>42</sup> *Id.* at 182; see Kerry Ryan, *Using the Uniform Commercial Code to Protect the “Ideas” That Make the Movies*, 27 SANTA CLARA L. REV. 693, 694 (1987) (arguing that screenwriters face a “high risk of appropriation” under copyright law); *Columbia Wins TV-Show Copyright Case*, L.A. TIMES (Apr. 10, 1999), <http://articles.latimes.com/1999/apr/10/business/fi-25924>; Eriq Gardner, *Judge: Writer Must Pay Fox \$40,000 for Claiming “Alien vs. Predator” Stole His Script*, HOLLYWOOD REP. (Aug. 24, 2011, 8:32 AM), <http://www.hollywoodreporter.com/thr-esq/judge-writer-pay-fox-40000-227204>; Eriq Gardner, *You Sue a Studio, They Make You Pay*, HOLLYWOOD REP. (Feb. 2, 2011, 9:48 PM), <http://www.hollywoodreporter.com/news/sue-studio->

sons for this lack of success are threefold – either movie studios rarely appropriate copyrighted works – hence the reason behind clearance experts; the suits are misguided because the claimant lacks the adequate copyright knowledge; or, the courts are hostile to such claims, and thus employ more exacting standards, making it extremely difficult to prove copyright infringement.<sup>43</sup>

## II. PROVING COPYRIGHT INFRINGEMENT

Copyright infringement relating to motion pictures typically falls into three scenarios: (1) an author claims its literary work has been used as the basis of a film; (2) an author of a work of visual art alleges that his work was used in a film; or (3) an author of a visual work sues a film maker for digitally manipulating the author's image for use in a film.<sup>44</sup> The doctrine of *scènes à faire* puts forth the theory that there are only a limited amount of basic plot ideas in the world, and as a result, writers are bound to create parallel, if not identical ideas. Due to this fact, it is not surprising that the most popular area for infringement suits is the allegation of plot appropriation.<sup>45</sup>

For a writer to prove copyright infringement they must show: (1) copyright ownership, (2) copying of the work, and (3) that such copying relates to cop-

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pay-95267; Frances Grandy Taylor, *In Filmmaking, Lawsuits Thicken Plot*, HARTFORD COURANT (June 24, 1998), [http://articles.courant.com/1998-06-24/news/9806240194\\_1\\_writers-truman-show-lion-king](http://articles.courant.com/1998-06-24/news/9806240194_1_writers-truman-show-lion-king) (stating plagiarism and copyright cases brought by writers “are extremely difficult to win”).

<sup>43</sup> Greene, *supra* note 19, at 182.

<sup>44</sup> *Id.* at 183.

<sup>45</sup> Gladden, *supra* note 1, at 360.

yrightable material and is therefore deemed improper appropriation.<sup>46</sup> Under common law, an author of a literary work (before publication) possesses the same rights as in any other property he possesses. Mainly, the author has full control over his work in terms of first publication, and may prevent others from using such work.<sup>47</sup> The common law right to one's creative work is not exactly a copyright, since it includes the right to refuse, to perform, publish, dramatize, or copy.<sup>48</sup> Once an author obtains a copyright under federal statute, their common law literary rights are abandoned.<sup>49</sup> Accordingly, proving copyright ownership in a copyright infringement action depends on proof of ownership in compliance with the Copyright Act.<sup>50</sup>

### ***A. The Two-Step Test***

Copyright infringement consists of the following elements: (1) copying and (2) improper appropriation.<sup>51</sup> Copying can be shown by either admission or reasonable opportunity to access the material, and similarity between the works. If there is evidence of both access and similarity, an inference of copying is established.<sup>52</sup> Still, not all copying is illegal. Only copying that includes more than a de minimis amount of copyrightable expression will constitute copyright infringement.<sup>53</sup> This further refinement of

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<sup>46</sup> *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977).

<sup>47</sup> Cross, *supra* note 7, at § 3.

<sup>48</sup> *Id.*

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

<sup>50</sup> *Sid & Marty*, 562 F.2d at 1162; 17 U.S.C. § 107 (2012).

<sup>51</sup> *Sid & Marty*, 562 F.2d at 1162.

<sup>52</sup> *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

<sup>53</sup> Lemley, *supra* note 16, at 720.

identifiable copying is improper appropriation.<sup>54</sup>

The two-step test may be proven in court based on the majority approach, defined by the Second Circuit in *Arnstein v. Porter* and the Ninth Circuit in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*<sup>55</sup> The Second Circuit answers the question of who evaluates the copyright infringement in two parts. First is the analysis and dissection stage, which receives the aid of expert testimony and asks whether the defendant copied from a copyrighted work. Second is the “ordinary observer” test to determine if such copying was illicit, and is apparent to the layperson.<sup>56</sup> The Ninth Circuit refers to the same two steps, but as extrinsic and intrinsic analyses.<sup>57</sup>

### 1. Copying

Much time seems to be spent in courts analyzing both access and probative similarity, which make up copying. Yet, the courts place the most emphasis on the circumstantial evidence of access, which presumably allows the trier of facts to “reasonably infer copying,” but also requires analytic dissection.<sup>58</sup> The dissection seems misplaced, as it is not the access that the law protects, but rather the copyrightable elements of an idea. The extrinsic evidence used to establish access is focused on so much that it inevitably falls over to the probative similarity part of copying, the second element of the first step, and to the entire second step, finding a misappropriation.

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 721-22.

<sup>56</sup> *Arnstein*, 154 F.2d at 468.

<sup>57</sup> *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977).

<sup>58</sup> *Arnstein*, 154 F.2d at 468.

In *Arnstein*, the court found, after listening to the compositions of Ira Arnstein and defendant Cole Porter, that similarities existed. Together with access, the court suggested, a reasonable jury may infer copying.<sup>59</sup> This test seems to correspond to that of the ordinary observer test, which depends “on the response of the ordinary reasonable person.”<sup>60</sup> The court in *Arnstein* does not explain the relevance of the analytic dissection element of the copying step, only stating that it is.<sup>61</sup>

This inevitably influences courts to focus on the dissection of copying and the access that *Arnstein* allows to infer such copying, and focus less on deciding whether or not the copying was permissible. The access hurdle can be overcome if and when it is shown that a plaintiff's work was available to the public, or specifically available to the defendant.<sup>62</sup> Yet, the courts make it difficult to establish access and may never get to the more crucial elements of copyright infringement: that of misappropriation.

Courts require a reasonable possibility of access to the work, rather than a mere possibility.<sup>63</sup> Plaintiffs must prove a chain of events, which leads to a reasonable possibility of defendant viewing the work.<sup>64</sup> Usually, there is an intermediary in between the author and alleged infringer, yet courts demand a showing of a close relationship in order to establish a reasonable opportunity of access.<sup>65</sup> What constitutes a close relationship for the courts has been ex-

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<sup>59</sup> *Id.* at 469.

<sup>60</sup> *Sid & Marty*, 562 F.2d at 1164.

<sup>61</sup> *Arnstein*, 154 F.2d at 468.

<sup>62</sup> *Towler v. Sayles*, 76 F.3d 579, 582 (4th Cir. 1996).

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

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 583.

tremely strict. Courts want to see an overlap of subject matter in the dealing between the intermediary and infringer, and will not assume a close relationship without evidence of closeness related to the subject of the infringement.<sup>66</sup> The requirement of finding evidence of a reasonable possibility of viewing the work is more closely related to a reasonable opportunity to actually view the work.<sup>67</sup> Already, the appearance of misappropriation seems diluted by extrinsic evidence, which may or may not prove substantial copying.

One example of the courts placing too much emphasis on the evidence of a close relationship exists in *Towler v. Sayles*, in relation to the film *Pas-sion Fish*.<sup>68</sup> Virginia Towler had submitted her screenplay, *Crossed Wires*, to SCS Films, a successor company to Cinecom, who had previously released two films of John Sayles, and also shared a chairman, an office, and employees. A representative of the company had told Towler that her screenplay would be forwarded to Sayles. Of course, they later denied receiving the screenplay and the court found as a matter of law that there was no way for a jury to find that Sayles denied the truth.<sup>69</sup> The court held that the dealings between SCS and Sayles needed to involve more of an overlap in subject matter to find access.<sup>70</sup> Yet, it seems quite likely, or at least reasonable, that a jury might find that someone from Cinecom would have given the script to Sayles, considering Towler's request for such and testimony that such an agreement between Towler and a repre-

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<sup>66</sup> Gladden, *supra* note 1, at 367.

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

<sup>68</sup> *Towler v. Sayles*, 76 F.3d 579 (4th Cir. 1996).

<sup>69</sup> *Id.* at 582-83.

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

sentative of SCS was made.<sup>71</sup>

Similarly, in *Herzog v. Castle Rock Entertainment*, the aforementioned Sayles and his film *Lone Star* were the subject of an alleged infringement of a script written by a high school teacher for her thesis, entitled *Concealed*.<sup>72</sup> Herzog had given her script to William Cosford, a renowned film critic, and asked him to serve on her thesis committee. Although he declined due to time constraints, he had retained a copy of Herzog's thesis in his possession.<sup>73</sup> Both Cosford and Sayles had attended the Miami Film Festival that same year. Evidence showed that the two had a personal relationship where they had associated on many occasions and had been seen together at the festival in previous years.<sup>74</sup> Although it seemed quite probable that Cosford could have passed along the script to Sayles, the court found that it was unreasonable to presume that Cosford, as a respected film critic, could have given Sayles the script, acting as a "conduit for the film industry."<sup>75</sup>

It seems as though some courts get caught up with the access factor and stray too far away from the importance of copyright infringement: the actual unlawful copying. Perhaps courts tend to eliminate cases within the access stage because most cases that get past this barrier still end in failure during further evaluation in the illicit copying phase, examining similarities. Yet, more often than not, courts will "dispense the access requirement altogether if the two works are so strikingly similar as to preclude in-

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<sup>71</sup> Gladden, *supra* note 1, at 367-68.

<sup>72</sup> *Herzog v. Castle Rock Entm't*, 193 F.3d 1241, 1243 (11th Cir. 1999).

<sup>73</sup> *Id.* at 1244.

<sup>74</sup> *Id.* at 1245.

<sup>75</sup> *Id.* at 1251.

dependent creation.”<sup>76</sup>

In *Sid & Marty Krofft Television Productions Inc. v. McDonald’s Corp.*, copyright infringement of the Krofft’s television series by McDonald’s television commercials was the issue at hand.<sup>77</sup> Here, access was unnecessary to prove, since the similarities were not only striking, the defendant also admitted to copying the idea from the plaintiff.<sup>78</sup> Instead, courts now focused on whether the copying constituted misappropriation. Krofft’s television series, *Pufnstuf*, consisted of a fantasyland that was inhabited by fanciful costumed characters, talking books, and moving trees. McDonald’s then released an advertising campaign for *McDonaldland*, which was based on the series and even employed the same set and costume designers used for *Pufnstuf*.<sup>79</sup> After the campaign launched, the Kroffts lost their licensing agreement with various toy manufacturers. In addition, the Ice Capades replaced the use of the *Pufnstuf* characters with the McDonaldland characters.<sup>80</sup>

## 2. Improper Appropriation

McDonald’s, the defendants in *Sid & Marty*, contended, albeit unsuccessfully, that although the ideas of McDonaldland and *Pufnstuf* were similar, the expressions of the idea were too dissimilar to find liability.<sup>81</sup> Likewise, the difficulty in comparing similarities between two works of literary art is that elements such as plot and theme may seem similar

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<sup>76</sup> *Id.* at 1248.

<sup>77</sup> *Sid & Marty Krofft Television Productions, Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1161 (9th Cir. 1977).

<sup>78</sup> *Id.* at 1165.

<sup>79</sup> *Id.* at 1161.

<sup>80</sup> *Id.* at 1162.

<sup>81</sup> *Id.* at 1165.

in the abstract, yet the law will only protect the expression of an idea and not the idea generally.<sup>82</sup> The court in *Sid & Marty* relied on the ordinary observer test and undoubtedly found that the “total concept and feel” of McDonaldland’s characters were similar to the characters of *Pufnstuf* and so infringement existed.<sup>83</sup> Yet, the court overlooks the defendant’s argument about separating the idea from the expression. If an extrinsic test was allowed, and dissection of the protected and unprotected elements was pursued, it is likely that the finding would not have resulted in liability.

To help clarify where the line is drawn between an idea and an expression of an idea, Judge Learned Hand articulated the “abstractions test.” The abstractions test states that with any work many general patterns can be found, “as more and more of the incident is left out.”<sup>84</sup> Rather, it is easy to find similarities in two pieces of art when you ignore the differences. This is why decisions of substantial similarity cannot help much in new cases and must inevitably be made ad hoc.<sup>85</sup> Although there is no set standard for copyright infringement cases dealing with art, when courts dissect the elements of a literary work by character, plot, theme, and mood – a move from the abstract to the specific – this helps establish a valid assessment of an improper appropriation.<sup>86</sup>

The plot of a screenplay is the crux of all copyright infringement claims. As mentioned previously,

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<sup>82</sup> *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

<sup>83</sup> *Sid & Marty*, 562 F.2d at 1167.

<sup>84</sup> *Nichols*, 45 F.2d at 121.

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

<sup>86</sup> *Id.*; Gladden, *supra* note 1, at 365.

writers easily find their ideas in films they watch, but may not understand the difference between an idea, which is unprotected, and the expression of the idea, which may be protected. In the seminal case, *Nichols v. Universal Corporation*, Judge Learned Hand used his abstraction test to determine whether appropriation was improper regarding defendant's film *The Cohens and the Kellys* and plaintiff's play *Abie's Irish Rose*.<sup>87</sup> Judge Hand searched through each level of the stories, looking for the place to draw the line between the expression and the idea. By focusing on the theme, plot, and character, the court concluded that there was no misappropriation.

Both stories revolved around a Jew and an Irish Catholic, living in New York, who marry against their parents' will. Yet, the theme of different backgrounds converging was both unoriginal and, even assuming it was novel, uncopyrightable.<sup>88</sup> Likewise, the characters of each play are mere stock characters, which the court describes as the "low comedy Jew and Irishman."<sup>89</sup> Judge Hand explained that "the less developed the characters, the less they can be copyrighted."<sup>90</sup> By not allowing extrinsic evidence in determining misappropriation, the ordinary observer may miss the similarities of stock characters, or they may automatically deem them to be exactly the same.

### ***B. The Ordinary Observer in Film***

The court in *Arnstein* leaves the issue of improper appropriation to the jury and categorizes it as

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<sup>87</sup> *Nichols*, 45 F.2d at 120.

<sup>88</sup> *Id.* at 122.

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

<sup>90</sup> *Id.* at 121.

an issue of fact.<sup>91</sup> The concern is summed up as “whether defendant took from plaintiff’s works so much of what is pleasing to ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.”<sup>92</sup> Lay listeners are relevant because they make up the relevant audience in the *Arnstein* case.

For film, the relevant testimony would therefore rely on the general audience, which films are intended for. Perhaps it is easy to test the reaction of a general audience to determine similar overall concepts between two films, as suggested by *Arnstein*.<sup>93</sup> However, this does not seem to complete the test of improper appropriation. The elements that deserve protection are overlooked when improper appropriation is left in the hands of the lay observer who is not properly educated on the differences between protectable and unprotectable elements.<sup>94</sup>

Audience members who make up the jury are prone to evaluating the art as they see fit, or, more likely, as was described by any expert testimony given during dissection of the copying elements. How can they truly ignore the facts already established? The question is more likely focused on what they see as copied art, rather than deciding whether the art copied falls under the law’s protection.

For example, scènes à faire are exceptions to copyright protection because they are scenes that are a necessary result of a certain situation.<sup>95</sup> Once an

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<sup>91</sup> *Arnstein v. Porter*, 154 F.2d 464, 472-73 (2d Cir. 1946).

<sup>92</sup> *Id.* at 473.

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

<sup>94</sup> Lemley, *supra* note 16, at 739.

<sup>95</sup> *See, e.g., Walker v. Time Life Films, Inc.*, 784 F.2d 44 (2d Cir. 1986) (holding that “[e]lements such as drunks, prostitutes,

*The Copyright Infringement Test*

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author chooses a situation, “it calls for certain sequences in the methods of treatment, which cannot be avoided, because they are, in the very nature of the development of the theme, and are used by every writer who knows his craft.”<sup>96</sup> Although such scenes flow from a common idea, they are likely to be expressed in a stereotyped form.<sup>97</sup> Separating out such scenes is helpful in determining whether there is improper appropriation and actionable copyright infringement.<sup>98</sup> Yet courts do not elaborate on what makes such stock scenes necessary and how the ordinary observer is to determine these scenes in copyright infringement evaluations.<sup>99</sup>

The phrase “every writer that knows his craft” suggests that evidence of expert testimony is necessary to determine the true elements of similarities of a work. While expert testimony is permitted in determining copying, the test of the ordinary observer

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vermin and derelict cars would appear in any realistic work about the work of policemen in the South Bronx” and thus were unprotectable scènes à faire); *CBS Broad., Inc. v. ABC, Inc.*, No. 02-CIV-8813-LAP 2003 U.S. Dist. LEXIS 20258 (S.D.N.Y. Jan. 14, 2003) (establishing that stock devices in reality television game shows, such as, a million dollar prize, dividing contestants into teams, highlighting the surroundings where a competition takes place, and depriving contestants of basic human needs, all fall under scènes à faire, and are not protected); *Cain v. Universal Pictures Co.*, 47 F. Supp. 1013 (S.D. Cal. 1942) (establishing a scene where two characters take refuge in a church after a storm is an uncopyrightable, incidental scene).

<sup>96</sup> *Schwarz v. Universal Pictures Co.*, 85 F. Supp. 270, 276 (S.D. Cal. 1945).

<sup>97</sup> *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986).

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

<sup>99</sup> Leslie A. Kurtz, *Copyright: The Scènes à Faire Doctrine*, 41 FLA. L. REV. 79, 88 (1989).

for illicit copying does not. Nonetheless, jurors may hear evidence, whether expert or lay, that may skew their judgment of improper appropriation. While they may be instructed to ignore the evidence, they still are aware that such evidence exists and therefore may apply that, and its unprotectable nature, to the work as a whole. Where a work is a combination of protectable and unprotectable elements, a more discerning ordinary observer test is necessary, which requires that the court first filter out from consideration any non-protectable elements.<sup>100</sup>

Perhaps using the ordinary observer of the intended audience is inappropriate. If courts will not allow extrinsic evidence to determine the more critical aspect of copyright infringement, then perhaps the intended audience should be replaced with the view of the writer.

### III. COPYRIGHT INFRINGEMENT COMPARED TO TRADEMARK

More appropriately, trademark infringement cases use the average consumer to fulfill the ordinary observer test. Trademark infringement is defined as a likelihood of confusion among consumers as to the source of the product.<sup>101</sup> The ordinary consumer can thus more easily identify trademark infringement than the ordinary observer can identify copyright infringement. With copyright infringement, the average observer may not understand the origin of the copyright, as it is not marked by a brand and is not as easily identifiable as a trademark would be. Therefore, copyright infringement should be held to a

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<sup>100</sup> Sheldon Abend Revocable Trust v. Spielberg, 748 F. Supp. 2d 200, 203-04 (S.D.N.Y. 2010).

<sup>101</sup> 15 U.S.C. § 1114 (2012).

higher standard than that used for trademark infringement by focusing on illicit copying and allowing extrinsic evidence for the same.

Where copyright seems to place more emphasis on the art and its expression, trademarks help aid consumerism and thus, extrinsic evidence may not be required because the ordinary observer is now the ordinary purchaser. The general rule is that no more of the trademark should be used than necessary for the legitimate purpose.<sup>102</sup> A fair use must be artistically relevant and not explicitly misleading.<sup>103</sup> Since a major relevant factor includes the consumer and their impression, the reasonable prudent purchaser is likely more competent than the ordinary observer, allowing a lesser need for experts.

Under the Lanham Act, it is the likelihood of confusion that is the standard for liability, rather than actual confusion.<sup>104</sup> To determine such likelihood courts have relied on “similarity of appearance,” which is examined by “sight, sound, and meaning.”<sup>105</sup> Evidence of confusion is usually presented in the form of consumer surveys. Thus, trademark cases are “fact-driven” and “necessarily subjective and impressionistic.”<sup>106</sup> Trademark infringement cases in-

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<sup>102</sup> *Louis Vuitton Malletier S.A. v. Warner Bros. Entm’t Inc.*, 868 F.Supp.2d 172, 177 (S.D.N.Y. 2012).

<sup>103</sup> *Id.*

<sup>104</sup> 15 U.S.C. § 1114.

<sup>105</sup> K.J. Greene, *Abusive Trademark Litigation and the Incredible Shrinking Confusion Doctrine – Trademark Abuse in the Context of Entertainment Media and Cyberspace*, 27 HARV. J.L. & PUB. POL’Y 609, 620 (2004) (quoting JANE C. GINSBURG ET AL., TRADEMARK AND UNFAIR COMPETITION LAW 398 (3d ed. 2001)).

<sup>106</sup> *Id.* (quoting Richard L. Kirkpatrick, *Likelihood of Confusion in Trademark Law*, in 2 PLI’S SIXTH ANNUAL INSTITUTE FOR INTELLECTUAL PROPERTY LAW, at 85, 96).

volving motion pictures, therefore, have a more identifiable “ordinary observer” than the copyright infringement case, i.e., anyone who goes to the movies.

Another reason why the reasonable prudent purchaser is more competent than the ordinary observer in a copyright infringement case against a filmmaker is because, with trademark infringement claims, the allegation does not involve an abstract idea, but rather an unauthorized use of a concrete mark.<sup>107</sup> The line between copyright and trademark claims is quite distinctive in that way. However, on occasion, the line may become blurred. Such blurred lines further demonstrate how the ordinary observer is confused as to what constitutes copyrightable elements, and therefore requires extrinsic elements to aid them.

For instance, in *Comedy III Productions, Inc. v. New Line Cinema*, the defendant brought a trademark infringement claim for use of a clip of *The Three Stooges* in New Line’s film, *The Long Kiss Goodnight*.<sup>108</sup> Even the court had trouble understanding how the use of a clip was the subject of a trademark infringement claim and not a copyright infringement claim.<sup>109</sup> Yet, the plaintiff insisted that the clip was an enforceable, cognizable trademark because the clip itself was indicative of *The Three Stooges* comedy.<sup>110</sup> They claimed that their protected right was in the “name, characters, the likeness, and overall act.”<sup>111</sup> Still the court found no cognizable trademark, one that the public can recognize as a

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<sup>107</sup> 15 U.S.C. § 1114.

<sup>108</sup> GRAEME B. DINWOODIE & MARK D. JANIS, TRADEMARKS AND UNFAIR COMPETITION: LAW AND POLICY 138-39 (3d ed. 2004).

<sup>109</sup> *Id.* at 139.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

*The Copyright Infringement Test*

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symbol of *The Three Stooges*, either by inherent distinctiveness or acquisition of a secondary meaning.<sup>112</sup>

Another example of how the reasonable prudent purchaser is a more reliable test than that of the ordinary observer exists in the 2012 decision of *Louis Vuitton Malletier S.A. v. Warner Bros. Entertainment Inc.*, in relation to film *The Hangover Part II*. The plaintiff alleged trademark infringement for display of counterfeit Louis Vuitton bags, used in an airport scene by one of the main characters.<sup>113</sup> The character refers to the bags as a “Lewis Vuitton” and that is the last reference made in the film. Louis Vuitton complained that many consumers believed that the counterfeit bags used in the film were genuine Louis Vuitton products.<sup>114</sup>

Using the *Rogers* test,<sup>115</sup> the court noted that finding artistic relevance “merely must be above zero.”<sup>116</sup> “Above zero” is a standard that is not available to the ordinary observer. The courts defer the responsibility of determining “how meaningful” a connection between a trademark and artistic work must be.<sup>117</sup> The artistic relevance prong simply establishes the intent of a non-commercial association with the trademark, eliminating any bad faith effort to

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

<sup>113</sup> *Louis Vuitton Malletier S.A. v. Warner Bros. Entm’t Inc.*, 868 F.Supp.2d 172, 174 (S.D.N.Y. 2012).

<sup>114</sup> *Id.* at 175.

<sup>115</sup> *Rogers v. Grimaldi*, 875 F.2d 994 (1989) (holding that the copyright act should be construed to apply to artistic works only when the public interest in avoiding consumer confusion outweighs the public interest in free expression).

<sup>116</sup> *Louis Vuitton*, 868 F.Supp.2d at 178 (quoting *E.S.S. Entm’t 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1100 (9th Cir. 2008)).

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

exploit the mark.<sup>118</sup> Again, the ordinary observer does not have the luxury of dismissing bad faith for artistic expression. The scene in which the counterfeit Louis Vuitton bag appears is used for comedic effect and displays the character's socially inept traits. The court finds such use genuinely relevant to the film's story and thus, the first prong of the *Rogers* test is satisfied.<sup>119</sup>

The second prong of the test relates to consumer confusion, which is the ultimate consideration in trademark infringement allegations. If the use of a mark is so misleading as to induce the public to believe the use was "prepared or otherwise authorized by the plaintiff" the use will be denied First Amendment protection.<sup>120</sup> This is an immediate recognition upon the judgment of the reasonable prudent purchaser, an immediacy that is unavailable for the ordinary observer.

The Lanham Act is purposefully strict in its accommodation of free expression. This is achieved by limiting restriction of its application to those cases that present the "greatest risk of consumer confusion: namely, when trademarks are used to 'dupe[ ] consumers into buying a product they mistakenly believe is sponsored by the trademark owner.'"<sup>121</sup> Therefore, if a trademark is not directly used to designate the source of the defendant's work then the interest in avoiding deception is slight. And if the defendant is not using the mark as its own trade-

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<sup>118</sup> *Id.*

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

<sup>120</sup> *Id.* at 179 (quoting *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2 1366, 1379 (2d Cir. 1993)).

<sup>121</sup> *Id.* at 180 (quoting *Rock Star Videos*, 547 F.3d at 1100, quoting *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 806 (9th Cir. 2003)) (alterations in original).

mark, then the viewer is not “confus[ed] . . . into believing that the two marks identify a single source.”<sup>122</sup>

In the film, the counterfeit Louis Vuitton bags appear for a few seconds in the background of a single scene, making it highly unlikely for a viewer to even notice the difference in bags. Furthermore, it is nearly implausible to presume that viewers would take the character’s comments about designer bags and attribute those views to the filmmakers themselves.<sup>123</sup> Because there is no evidence of a “particularly compelling” likelihood that consumers will be confused as to the source of the counterfeit bag as a genuine Louis Vuitton, the First Amendment defense and the public interest in protecting free expression of noncommercial speech ultimately prevails.<sup>124</sup>

Simply put, if the reasonably prudent purchaser is confused as to Louis Vuitton’s connection with the film, then there is an infringement. Yet, if the ordinary observer is confused as to the source of two works, this does not equate to infringement.

#### IV. PROPOSED SOLUTIONS

Although avoiding frivolous suits is imperative in maintaining a streamlined court system, to retain the essence of the copyright law, more emphasis should be placed on determining misappropriation. To do so, dissection of copyrightable elements should be left out of the first part of the *Arnstein* test, where similarities are analyzed, and placed in the second factor where illicit copying is determined.<sup>125</sup>

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<sup>122</sup> *Id.* (quoting 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:11.50 (4th ed.)).

<sup>123</sup> *Id.* at 182.

<sup>124</sup> *Id.*

<sup>125</sup> *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

*The Copyright Infringement Test*

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To show infringement, the main concern is whether a defendant copied more than a de minimis amount of protectable expression. The first inquiry, therefore, is whether a defendant copied from the plaintiff. The Ninth Circuit describes this inquiry of substantial similarity as a simple one.<sup>126</sup> Yet, dissection of the work into protectable and unprotectable elements is employed. Similarities of two works are probative of copying regardless of whether the similarities lie in protected elements or not.

Here is where defendants backed by expensive lawyers overrun the small time writer: defendant Hollywood producers and writers have the resources to pick apart the elements which are questionably copyrightable without having to give credit to the original source. For this reason it appears more useful to employ the ordinary observer, instead of expert testimony, to determine whether the “total concept and feel” is similar to the copyrighted work and thus probative of copying.

The second part of the test, which the Ninth Circuit describes as more complex, is more appropriate for both analytical dissection and expert testimony.<sup>127</sup> The line between the uncopyrightable idea and the copyrightable expression of an idea is rather thin and quite difficult for courts to decipher.<sup>128</sup> Nonetheless, the ordinary observer is unlikely to understand precisely which elements fall under copyright protection and will likely not be able to separate them from unprotected elements. Such concepts are generally out of the purview of the public at

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<sup>126</sup> Sid & Marty Krofft Television Productions, Inc. v. McDonald’s Corp., 562 F.2d 1157, 1164 (9th Cir. 1977).

<sup>127</sup> *Id.*

<sup>128</sup> Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

large. Therefore, dissection of the work in question is required to determine misappropriation, and often, expert testimony is necessary to aid such determination.

Perhaps substituting extrinsic analysis for intrinsic analysis, and vice versa, for all copyright infringement cases may be problematic as most circuits have already implemented the *Arnstein-Krofft* test of the Second and Ninth Circuits. However, by allowing dissection and expert testimony in both prongs of the test, courts can avoid the difficult problem of juries attempting to ignore evidence already heard. Further, this would allow juries to understand what elements should be analyzed as an ordinary observer.

Moreover, if the misappropriation prong is better served by dissection of copyrightable elements, it seems best if this was considered a factor to be decided as a matter of law. The very principle behind illicit copying is an incident of copying that reaches beyond the point of unlawful appropriation, or the copying of the protected expression itself. Because the line between idea and expression is already so blurred, it seems appropriate for courts to be the determiner.

### CONCLUSION

Most plaintiffs of infringement cases targeting filmmakers and studios are not prepared to face the realities and complexities of copyright law. After a thorough evaluation of the elements above it is easy to see why so many copyright infringement suits tend to fail. It seems that courts are “intuitively hostile” to claims against films either because of the belief that too often these cases are based on a misunderstanding of what copyright in fact does protect or

on an “obsessive conviction” prevalent in the minds of many authors and artists alike, “that all similarities between their work and any other which appear later must inevitably be ascribed to plagiarism.”<sup>129</sup> The proposal above will aid the courts in determining more accurate decisions in copyright infringement cases, thusly educating writers and juries alike in what actionable copyright infringement actually entails.

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<sup>129</sup> Greene, *supra* note 19, at 185.