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## All Puff and No Stuff: Avoiding the Idea/Expression Dichotomy

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# ALL PUFF AND NO STUFF: AVOIDING THE IDEA/EXPRESSION DICHOTOMY

## I. INTRODUCTION

Television commercials are often entertaining. Copyright law recognizes advertising as an art form and extends protection to the authors. However, copyright law protects only the expression of an idea, not the idea itself. The issue is where to draw the line between an idea and the expression of that idea. Courts have formulated several tests to determine where the idea ends and expression begins. While the tests are helpful, none of them are completely accurate. In fact, some have proved troublesome and confusing.

In *C. Blore & D. Richman, Inc. v. 20/20 Advertising*<sup>1</sup> (“*Blore*”), the United States District Court for Minnesota held that the editing, nontextual and stylistic aspects of the plaintiffs’ commercials were expressive elements entitled to copyright protection.<sup>2</sup> In reaching its decision, the court applied the Ninth Circuit’s extrinsic/intrinsic test.<sup>3</sup> The court in *Blore* avoided separating ideas from expression, illustrating the problem with the Ninth Circuit test.

## II. STATEMENT OF THE FACTS

*Blore* involved a dispute over a series of television commercials produced by the defendants, 20/20 Advertising (“20/20”) and Duling Optical Corporation (“Duling”).<sup>4</sup> The plaintiffs, Chuck Blore & Don Richman, Inc. (“Blore”), claimed that Duling had substantially copied Blore’s “Deborah Daily News” commercial.<sup>5</sup> Duling and 20/20 filed a motion for summary judgment, claiming that the allegedly copied portions of the Blore commercials were merely ideas or concepts, not entitled to copyright protection.<sup>6</sup>

Blore’s copyrighted commercials feature the actress Deborah Shelton, best known for her role as Mandy Winger in the television series “Dallas.” Blore produced the first commercial featuring Shelton in 1980.

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1. 674 F. Supp. 671 (D. Minn. 1987).

2. *Id.* at 677.

3. *Id.* at 679.

4. *Id.* at 673.

5. Duling representatives admit to making unauthorized copies of the “Deborah Daily News” tape. *Id.* at 674.

6. *Id.* at 675.

In 1986, Blore produced six other Shelton commercials, including "Deborah Daily News."<sup>7</sup>

The commercials were approximately twenty-five to thirty seconds long, during which Shelton extolled the virtues of either a South Carolina radio station or "The Daily News," which circulates in the San Fernando Valley in California. Television stations ran these commercials in and around South Carolina and the San Fernando Valley, respectively.<sup>8</sup>

Each commercial opened with a closeup of Shelton wearing an unbuttoned white shirt with blue stripes. The word "Deborah" appeared in the lower left of the screen. A series of rapid edits followed, including twenty closeups of Shelton's face against a green background. With each line of text spoken by Shelton, the camera cut to a new closeup featuring Shelton in a different pose with a different hairstyle and expression.<sup>9</sup>

In 1986, the defendant, Duling, decided to change its advertising strategy. Duling's previous commercials used noncelebrities speaking directly to the audience without using music or props. In the new commercials, Duling decided to use a celebrity spokesperson with "nice eyes."<sup>10</sup> It narrowed the list of celebrities down to Shelton and one other actress. Before any of its employees viewed Blore's "Deborah Daily News" commercial, Duling selected Shelton for its commercials.<sup>11</sup>

The Duling commercial was thirty seconds long and presented fourteen different poses of Shelton. The first pose was a closeup with the words "Deborah Shelton" appearing at the lower right of the screen. The commercial also contained medium range shots in which Shelton's upper body was visible. In each pose Shelton wore a different hairstyle, a blue striped blouse that was alternatively buttoned and unbuttoned, and either a different pair of glasses or no glasses at all. With each new pose, Shelton read a new line of text.<sup>12</sup>

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7. *Blore*, 674 F. Supp. at 673.

8. *Id.* at 674, 681.

9. The text of the Blore commercials was as follows:

What do the Daily News and a hot bubble bath have in common? Me. I just love them both. Everybody knows about the Daily News' commitment to the Valley [a]nd its commitment to excellence. There is another paper that says it covers the Valley [b]ut everybody knows [t]hey're over the hill. Can you imagine living in the Valley and not reading the Daily News? That's like wearing all new underwear and not getting hit by a bus. What a waste. Daily News. Daily [a]nd Sunday. You [o]ught to look into that.

*Id.* at 674.

10. *Id.*

11. *Id.* at 673-74.

12. The text of the Duling commercials was as follows:

There are some things in life that should take more than an hour. But making your glasses isn't one of them. Duling Optical Super Store [h]as thousands of designer

The text and the subject matter of the Duling commercials were entirely different from the Blore commercials.<sup>13</sup> However, Blore contended that "the producers of the Duling commercials [had] substantially copied the expressive elements of the Blore commercials."<sup>14</sup> In particular, Blore alleged that the editing, changing of hairstyle, the framing, the use of a striped blouse, the positioning of the collar on the blouse, the jewelry, the tone of voice, the raising of eyebrows, and the voice level were substantially similar to that of its commercials.<sup>15</sup>

Blore brought suit in the United States District Court for Minnesota alleging copyright infringement. Duling and 20/20 moved for summary judgment contending that "neither the use of Shelton as the sole spokeswoman for a particular product, nor the use of rapid-edit close-ups [were] entitled to protection under . . . copyright . . . law[ ]."<sup>16</sup> Further, they argued that Blore was attempting to monopolize the use of the rapid edit montage style<sup>17</sup> involving closeups of Deborah Shelton, even though Blore did not have an exclusive licensing agreement with her. Therefore, Duling argued that, as a matter of law, Blore could not prove copying because any nontextual similarities between the commercials involved nonprotectable material.<sup>18</sup> In denying the motion for summary judgment,<sup>19</sup> the court found that the nontextual, stylistic aspects of Blore's television commercial were proper subjects of copyright protection.<sup>20</sup>

### III. THE COURT'S HOLDING AND REASONING

The court found that the commercials at issue in *Blore* were audiovisual works, making them eligible for protection under the copyright statute.<sup>21</sup> The court concluded that the individual artistic choices, such as

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frames [a]nd contact lenses to choose from. I can have my eyes examined [a]nd have my new glasses and [c]ontact lenses in about an hour. And they're guaranteed to be [p]rescription perfect. The Duling Optical Super Store [t]he one-stop shopping [t]hat allows me more time for [o]ther things.

*Blore*, 674 F. Supp. at 674-75.

13. *Id.* at 675.

14. *Id.*

15. *Id.*

16. *Id.*

17. Rapid-edit montage style edits frames of the film so it appears that the commercial flashes to a new sequence. The effect is similar to a slide show.

18. *Blore*, 674 F. Supp. at 675-76.

19. *Id.* at 680.

20. *Id.* at 678.

21. The court cited 17 U.S.C. § 101 (1982):

'Audiovisual works' are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with the accompanying sounds, if

montage style, camera angle, framing, hairstyle, jewelry, decor, makeup, and background are expressive aspects that, together with the sounds or text, make up the concept of the *Blore* commercials.<sup>22</sup> As part of the total communicative impact of the medium, these expressive elements could not be "divorced from the text and deemed irrelevant."<sup>23</sup>

The *Blore* court relied on cases involving photographs<sup>24</sup> and motion pictures<sup>25</sup> to support their finding that the copyright laws protected specific artistic choices.<sup>26</sup> The court, as in the photograph and motion picture cases, found these artistic choices, including the rapid edit style and the use of closeups, inherent in the visual style and tone of the *Blore* commercials, regardless of the characterization of the idea.<sup>27</sup> The court stated: "It is that expression, reflecting the unique perspective of individual creators which is entitled to protection."<sup>28</sup>

Duling and 20/20 relying on *Miller Brewing Co. v. Carling O'Keefe Breweries of Canada, Ltd.*,<sup>29</sup> argued that the *Blore* commercials merely represented the idea or concept of rapid edit closeup shots of a model and, therefore, were not entitled to copyright protection.<sup>30</sup> The *Miller* court held that commercials featuring arm wrestling, arguments in a tavern, poetry recitation, and siblings speaking in unison were only ideas or themes and did not constitute expressions subject to copyright protection.<sup>31</sup>

The *Blore* court distinguished *Miller*. Although both cases involved television commercials, the copyright issue in *Miller* centered on literary rather than audiovisual aspects of the commercial.<sup>32</sup> The court stated that literary elements are generally considered matters of public domain not entitled to copyright protection. Additionally, the literary elements

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any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

*Blore*, 674 F. Supp. at 677.

22. *Id.*

23. *Id.*

24. *Kisch v. Ammirati & Puris, Inc.*, 657 F. Supp. 380 (S.D.N.Y. 1987).

25. *Time Inc. v. Bernard Geis Assoc.*, 293 F. Supp. 130 (S.D.N.Y. 1968) (home movie films of the John F. Kennedy assassination were found copyrightable because they embodied many elements of creativity including kind of camera (movie not snapshot), kind of film (color), kind of lens (telephoto), area covered, timing and filming location).

26. *Blore*, 674 F. Supp. at 678.

27. *Id.*

28. *Id.* (citing *Jewelers' Circular Publishing Co. v. Keystone Publishing Co.*, 274 F. 932 (S.D.N.Y. 1921) (every photograph no matter how simple is influenced by the individual personality of the photographer)).

29. 452 F. Supp. 429 (W.D.N.Y. 1978).

30. *Blore*, 674 F. Supp. at 676.

31. *Miller*, 452 F. Supp. at 440. See *infra* text accompanying notes 144-49.

32. *Blore*, 674 F. Supp. at 678.

may include the recurrence of certain archetypical similarities in the plot, setting, and character development which were not at issue in the *Blore* commercials.<sup>33</sup> The *Blore* court found, in contrast to *Miller*, that the infringement issue involved "style not substance, images and tone not plots or characters."<sup>34</sup> These stylistic devices, the court said, go to the heart of copyright protection.<sup>35</sup>

Since the court found the nontextual, editing, and stylistic aspects of the *Blore* commercials proper subjects of copyright protection, it considered the issue of substantial similarity between the commercials.<sup>36</sup> The court used the Ninth Circuit test, a two step extrinsic/intrinsic analysis.<sup>37</sup> In the extrinsic step, the court compared the works for similarity of ideas.<sup>38</sup> It found extrinsic similarities in *Blore's* and *Duling's* use of television to present their thirty second commercials and the use of Deborah Shelton to promote their products. Then, the court went on to apply the intrinsic step, comparing similarity in expression. The *Blore* court found the intrinsic test very difficult to apply to commercials because of their brevity.<sup>39</sup> However, the court found substantial similarity in the "overall concept and feel" of the commercials and accordingly denied *Duling's* and *20/20's* motion for summary judgment.<sup>40</sup>

#### IV. THE ORIGIN AND PURPOSE OF COPYRIGHT PROTECTION

The United States Constitution provides that Congress has the power "to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries."<sup>41</sup> With this power, Congress enacted the Copyright Act of 1976.<sup>42</sup> This statute grants the author a pri-

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33. *Id.* (citing *Walker v. Time Life Films, Inc.*, 784 F.2d 44 (2d Cir. 1986) *cert. denied*, 476 U.S. 1159 (1986) (scenes involving foot chases, morale problems of police officers in the Bronx, and depiction of Irish police officers as drinkers were standard lore in police fiction and not entitled to copyright protection); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930) *cert. denied*, 282 U.S. 902 (1931) (structural and thematic elements of plaintiff's play "Abie's Irish Rose" were not entitled to copyright protection)).

34. *Blore*, 674 F. Supp. at 678.

35. *Id.* (citing *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706 (S.D.N.Y. 1987)).

36. *Blore*, 674 F. Supp. at 679.

37. *Id.* See *infra* text accompanying note 88 for a discussion of the Ninth Circuit test.

38. *Id.*

39. *Id.* at 679-80 (citing *Miller*, 452 F. Supp. at 441 (brevity of commercials precluded resort to detailed comparisons)).

40. *Blore*, 674 F. Supp. at 680.

41. U.S. CONST. art. I, § 8.

42. 17 U.S.C. §§ 101-810 (1982).

vate monopoly for a limited time<sup>43</sup> and the exclusive right to print, reprint, publish, copy, vend, and perform the copyrighted work for profit.<sup>44</sup> The purpose of this protection is to stimulate development in the arts and sciences, assuring that the intellectual and aesthetic product of authors will be made available for the benefit of the public.<sup>45</sup>

### A. *History of Copyright Protection for Advertising*

The word "advertising" does not appear in the list of subject matter covered by the Copyright Act.<sup>46</sup> However, the list is intended to be "illustrative and not limitative,"<sup>47</sup> allowing the courts the flexibility to determine the scope of particular categories.<sup>48</sup> Through the courts' interpretation, advertising has been brought under the protection of the copyright laws.

In 1891, the United States Supreme Court, in *Higgins v. Keuffel*,<sup>49</sup> first considered whether advertising could be copyrighted. The Court found such writings have "no possible influence upon science or the useful arts."<sup>50</sup> Because the Constitution provided only for the protection of works that would promote science and the useful arts, the Court held that Congress could not protect commercial writings.<sup>51</sup>

In 1903, the Supreme Court, in *Bleistein v. Donaldson Lithographing Co.*,<sup>52</sup> rejected *Higgins'* broad holding that commercial matter is not entitled to copyright protection. The Court held that a picture used in an advertisement is copyrightable.<sup>53</sup> Justice Holmes, writing for the majority, stated that only an absence of sufficient originality would place commercial matter outside the scope of copyright protection.<sup>54</sup> The dissent adopted a broader reading of *Higgins*, stating that the pictorial illustration must have some connection to the fine arts to give it intrinsic value and bring it within the provision of the Constitution.<sup>55</sup>

*Bleistein* signifies a change favoring copyright protection of advertising. However, the Court found the picture contained in the advertise-

43. 1 M. NIMMER, NIMMER ON COPYRIGHT § 1.03[A], at 1-32 (1988).

44. 17 U.S.C. § 106 (1982).

45. 1 M. NIMMER, *supra* note 43, § 1.03[A], at 1-31 to -32.

46. 17 U.S.C. § 102(a) (1982).

47. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 4 (1976).

48. *Id.*

49. 140 U.S. 428 (1891).

50. *Id.* at 431.

51. *Id.*

52. 188 U.S. 239 (1903).

53. *Id.* at 251.

54. *Id.* at 251-52.

55. *Id.* at 252-53 (Harlan, J., dissenting).

ment worthy of protection because it had sufficient artistic merit as a picture.<sup>56</sup> Thus, *Bleistein* can have two meanings.<sup>57</sup> First, copyright law may protect an advertisement only to the extent that the advertisement's individual elements—illustrations, copy, graphics, and layout—are protected. Second, and more broadly, the copyright laws may protect advertising, unless it is a label or a descriptive phrase so lacking in originality that it cannot be considered a writing.<sup>58</sup> Federal courts have adopted the broad reading of *Bleistein*, consistently finding advertising containing only a modicum of originality protectable under copyright legislation.<sup>59</sup>

### B. *The Idea/Expression Dichotomy*

The principle that copyright does not protect against the borrowing of ideas contained in the copyrighted work is codified in the current Copyright Act.<sup>60</sup> A central goal of copyright law is balancing the competing interests in rewarding individuals for their "unique creative efforts" while "making authors' ideas freely accessible to the public so that they may be used for the intellectual advancement of mankind."<sup>61</sup> The idea/expression dichotomy attempts to resolve these competing considerations.<sup>62</sup> Copyright rewards authors for their "unique creative efforts" by granting them limited monopolies in the profits generated by their work.<sup>63</sup> The ideas are thrust into the public domain so that they may be used for the intellectual advancement of mankind, thereby promoting science and the useful arts.<sup>64</sup>

The courts have continually struggled with the problem of separating idea from expression. Historically, copyright laws restricted infringe-

56. *Id.* at 251.

57. Linder, *Why Copyright Law Should Not Protect Advertising*, 62 OR. L. REV. 231, 234 (1983).

58. *Id.* See also 17 U.S.C. § 102(a) (1982). Section 102(a) provides: "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. . . ."

59. See Linder, *supra* note 57; Borden, *Copyright of Advertising*, 35 KY. L.J. 205 (1947); COMMENT, *Copyrights - The Protection of Advertising*, 5 VILL. L. REV. 615 (1960).

60. 1 M. NIMMER, *supra* note 43, § 13.03[A][1], at 13-20.2 (citing 17 U.S.C. § 102(b) (1982)). See also *Reyher v. Childrens Television Workshop*, 387 F. Supp. 869 (S.D.N.Y. 1975), *aff'd*, 533 F.2d 87 (2d Cir. 1976), *cert. denied*, 429 U.S. 980 (1976) (similarity of idea but not of expression between illustrations).

61. Hemnes, *The Adaptation of Copyright Law to Video Games*, 131 U. PA. L. REV. 171, 207 (1982) (quoting 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.03[A], at 13-19 (1988)).

62. Hemnes, *supra* note 61, at 207.

63. *Id.*

64. *Id.*



ment to verbatim copying of the entire original work.<sup>65</sup> The present Copyright Act protects “all aspects of an ‘original work of authorship’ except ‘any idea, procedure, process, system, method of operation, concept, principle, or discovery’ that is ‘described, explained, illustrated or embodied’ in the work.”<sup>66</sup>

## V. ESTABLISHING INFRINGEMENT

To establish copyright infringement,<sup>67</sup> the plaintiff must prove that he owns a valid copyright and that the defendant copied his work.<sup>68</sup> The plaintiff can prove copying by showing defendant’s access<sup>69</sup> to the copyrighted material, and substantial similarity between the protectable elements of the two works.<sup>70</sup>

Determining substantial similarity is an issue of fact.<sup>71</sup> To aid the fact finder in this determination, courts apply either the abstractions test or the ordinary observer test.<sup>72</sup> Additionally, some courts have developed important modifications of the ordinary observer test.<sup>73</sup>

### A. The Abstractions Test

In one of his last copyright cases, Judge Learned Hand said, “Obviously, no principle can be stated as to when an imitator has gone beyond the ‘idea’ and has borrowed its ‘expression.’ Decisions must therefore inevitably be *ad hoc*.”<sup>74</sup> Judge Hand did, however, suggest a helpful approach to the problem in his famous “abstractions test.”<sup>75</sup> Under this

65. *Id.* at 207-08.

66. *Id.* at 208-09 (quoting 17 U.S.C. § 102(b) (1976 & Supp. V 1981)).

67. It is undisputed that *Blore* had a valid copyright in his commercials, and that *Duling* had access to the copyrighted commercials. *Blore*, 674 F. Supp. at 675.

68. 3 M. NIMMER, NIMMER ON COPYRIGHT § 13.01, at 13-3 to -4 (1988).

69. Access may be shown by circumstantial evidence such as “striking similarity” between the works. 3 M. NIMMER, *supra* note 68, § 13.02[B], at 13-14 to -16. Access will not be discussed because *Duling* and 20/20 do not dispute that they had access to the *Blore* commercials. *Blore*, 674 F. Supp. at 675.

70. *Blore*, 674 F. Supp. at 675.

71. 3 M. NIMMER, *supra* note 68, § 13.03[E], at 13-47 (citing *Malkin v. Dubinsky*, 146 F. Supp. 111 (S.D.N.Y. 1956)).

72. *Id.* § 13.03[A], at 13-20 to -20.5, § 13.03[E], at 13-47 to -48.

73. See *Sid & Marty Krofft Television Prod., Inc. v. McDonald’s Corp.*, 562 F.2d 1157 (9th Cir. 1977); see also *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946).

74. 3 M. NIMMER, *supra* note 68, § 13.03[A], at 13-22.2 (quoting *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960)).

75. Judge Hand articulated what is known as the “abstractions test”:

Upon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out . . . [T]here is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his “ideas,” to which, apart from their expression, his prop-

test, layers of detail are removed from the works until they are similar. A trier of fact then decides whether the similarity is of idea or expression, based on the work's level of abstraction. This test has proven useful in analyzing dramatic works, literary works, and motion pictures, where recurring patterns can readily be abstracted into very general themes. While the abstractions test is helpful, it does not indicate at which level of abstraction a work crosses the line from idea to expression. However, when correctly applied, the test offers a general guide which avoids the conclusion that "nothing more can be said than that each case turns on its own facts."<sup>76</sup>

### B. *The Ordinary Observer Test and its Modifications*

The ordinary observer test involves a comparison of the original and the infringing work. The objective of the test is "to ascertain the effect of the alleged infringing [work] upon the public, that is, upon the average reasonable man. . . ."<sup>77</sup> If an ordinary person has a spontaneous and immediate reaction to the similarities in the works, a "literary piracy" or infringement exists.<sup>78</sup> Although critics claim that the courts misapply the test,<sup>79</sup> the test has not been completely rejected.<sup>80</sup> In the wake of such criticism, the Second and Ninth Circuits have modified the ordinary observer test. The modifications retain the original ordinary observer test while adding an additional step. Both the Second and Ninth Circuits refer to the additional step as the "extrinsic test," however, each applies the test differently.

#### 1. The Second Circuit Test

The first modification occurred in *Arnstein v. Porter*.<sup>81</sup> The Court of Appeals for the Second Circuit in *Arnstein* divided the issue of substantial similarity into two elements. The first element, the extrinsic test, compares the works using expert analysis<sup>82</sup> and dissection<sup>83</sup> to establish

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erty is never extended. Nobody has ever been able to fix that boundary, and nobody ever can . . . .

3 M. NIMMER, *supra* note 68, § 13.03[A], at 13-20.4 (quoting *Nichols v. Universal Pictures Co.*, 45 F.2d 119, 121 (2d Cir. 1930)).

76. 3 M. NIMMER, *supra* note 68, § 13.03[A], at 13-25 to -26.

77. *Id.* § 13.03[E], at 13-48 (quoting *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1, 18 (9th Cir. 1933)).

78. *Id.* (quoting *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1, 18 (9th Cir. 1933)).

79. *Id.* § 13.03[E], at 13-53.

80. *Id.* § 13.03[E], at 13-54.

81. 154 F.2d 464 (2d Cir. 1946).

82. Expert analysis uses experts in the particular artistic medium to testify as to particular customs and methods employed by the artists in the medium. The testimony is used to aid the

copying. The second element, the intrinsic test, is conducted without expert analysis and dissection. The intrinsic test is essentially an application of the ordinary observer test to the protectable expression of the works.<sup>84</sup>

Professor Nimmer offered a logical interpretation of this ambiguous test. Nimmer suggested the extrinsic test requires a determination of substantial similarity of expression, and not merely ideas; the court should make this determination regardless of the protectability of such expression.<sup>85</sup> Essentially, the extrinsic test is an application of the abstractions test. The intrinsic test applies the ordinary observer test to the protectable expression.<sup>86</sup> Nimmer's interpretation of the Second Circuit test allows expert analysis and dissection on the important issue of separating idea from expression, rather than leaving this determination to the ordinary observer. As Professor Nimmer states: "[t]he Copyright Act is intended to protect writers from the theft of the fruits of their labor, not to protect against the general public's 'spontaneous and immediate' *impression* that the fruits have been stolen."<sup>87</sup>

## 2. The Ninth Circuit Test

In *Sid & Marty Krofft Television Prod., Inc. v. McDonald's Corp.*,<sup>88</sup> the Court of Appeals for the Ninth Circuit built upon the *Arnstein* test, again modifying the ordinary observer test. The elements of the test are similarly referred to as the extrinsic and intrinsic tests, however, the Ninth Circuit defines them differently than the Second Circuit.

Under the Ninth Circuit formulation, the extrinsic test allows expert analysis and dissection to determine whether there is substantial similarity of general ideas.<sup>89</sup> Assuming that similarity of ideas is found in the extrinsic test, the second element, the intrinsic test, addresses the issue of substantial similarity in the expression of the ideas. The intrinsic test depends on the response of the ordinary reasonable person, and dissection and expert analysis are not permitted.<sup>90</sup>

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fact finder in separating the ideas from the expression. See *Arnstein v. Porter*, 154 F.2d 464, 473 (2d Cir. 1946).

83. Dissection involves analysis and comparison of the works by breaking them down and comparing the elements. *Id.*

84. 3 M. NIMMER, *supra* note 68, § 13.03[E], at 13-54 to -56.

85. *Id.* § 13.03[E], at 13-59 to -60.

86. *Id.* § 13.03[E], at 13-60.

87. *Id.* § 13.03[E], at 13-49 (emphasis in original).

88. 562 F.2d 1157 (9th Cir. 1977).

89. 3 M. NIMMER, *supra* note 68, § 13.03[E], at 13-56 to -57.

90. *Id.* § 13.03[E], at 13-57.

Nimmer criticized the Ninth Circuit test, stating it "unnecessarily limits the scope of the court's determination under the preliminary, extrinsic, test."<sup>91</sup> The only issue under the extrinsic test is idea similarity. Since copyright does not protect ideas, either the plaintiff or the defendant may stipulate to the copying of ideas whenever advantageous to avoid expert analysis and dissection. Even if a party does not stipulate to the copying of ideas, the value of expert analysis and dissection in the extrinsic test is virtually nonexistent because the test does not separate ideas from expression. In the intrinsic test, ideas are separated from expression by the less discriminating trier of fact applying the ordinary observer standard. In effect, this turns the trier of fact into an art critic.<sup>92</sup> Because the Ninth Circuit test virtually disposes of the extrinsic test, courts rarely can rule for the defendant prior to trial, as in *Blore*, or reverse on appeal a jury determination for the plaintiff.<sup>93</sup>

#### VI. *BLORE*: A RECENT DECISION INVOLVING THE SCOPE OF THE EXTRINSIC TEST

The *Blore* court correctly pointed out that commercials are audiovisual works protected under the broad definition in section 101 of the 1976 Copyright Act.<sup>94</sup> Duling and 20/20, the defendants, did not dispute either the existence of a valid copyright or the issue of access.<sup>95</sup> The issue, therefore, was whether the nontextual aspects of the *Blore* commercials contained protectable, "expressive" elements.<sup>96</sup>

##### A. *Comparison With Audiovisual Cases*

The *Blore* court cited two cases which illustrate the problem of separating idea from expression: *Atari, Inc. v. North American Philips Consumer Elec. Corp.*<sup>97</sup> and *Sid & Marty Krofft Television Prod., Inc. v. McDonald's Corp.*<sup>98</sup>

In *Atari*,<sup>99</sup> the owners of the copyright to the videogame "Pac-Man"

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91. *Id.* § 13.03[E], at 13-59.

92. "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrow and most obvious limits." *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

93. 3 M. NIMMER, *supra* note 68, § 13.03[E], at 13-57 to -58 (citations omitted).

94. *Blore*, 674 F. Supp. at 677 (quoting 17 U.S.C. § 101). For text of § 101 *see supra* note 21.

95. *Blore*, 674 F. Supp. at 675.

96. *Id.* at 675.

97. 672 F.2d 607 (7th Cir. 1982).

98. 562 F.2d 1157 (9th Cir. 1977).

99. The Seventh Circuit's *Atari* opinion has been noted as "the preeminent case to date on

sued the makers of a similar videogame "K.C. Munchkin" for copyright infringement.<sup>100</sup> The *Atari* court endorsed the ordinary observer test, stating: "[T]he test is whether the accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's *protectible expression* by taking material of substance and value."<sup>101</sup> The court focused its analysis on the "total concept and feel" of the copyrighted work, avoiding dissection and expert analysis.<sup>102</sup> However, since copyright protects only the authors' expression and not the idea itself, the court distilled the protectable forms of expression from the unprotected forms by using the abstractions test and the concept of "scenes a faire"<sup>103</sup> before applying the ordinary observer test. Thus, the *Atari* court seems to apply the Second Circuit test, suggesting that the Seventh Circuit also believes it is appropriate to separate the idea from its expression before applying the ordinary observer test.

Applying the abstractions test to the Pac-Man game, the court found that the game could be described accurately in abstract terms, just as one would describe the rules to a game.<sup>104</sup> The court concluded that the "maze-chase" game idea was not copyrightable.<sup>105</sup> Rather, the characters, described as "wholly fanciful creations, without reference to the real world,"<sup>106</sup> represented the authors' artistic expression. The court separated the unprotected ideas from their expression before finding infringement based on the substantial appropriation of the characters.<sup>107</sup>

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the issue of copyright protection for video games. The court's exposition of the standard principles of copyright law is thorough and accurate." Hemnes, *supra* note 61, at 196.

100. *Atari*, 672 F.2d at 610.

101. Hemnes, *supra* note 61, at 196 (quoting *Atari*, 672 F.2d at 614) (emphasis added).

102. Hemnes, *supra* note 61, at 196 (citing *Atari*, 672 F.2d at 614).

103. *Id.* at 196-97 (citing *Atari*, 672 F.2d at 615). "Scenes a faire" is "the sequence or pattern of scenes or events which necessarily must follow from the handling of similar plot situations." Copyright protection does not extend to such scenes. *Miller Brewing Co. v. Carling O'Keefe Breweries of Canada, Ltd.*, 452 F. Supp. 429, 439 (W.D.N.Y. 1978).

104. The description of the game was: "a maze chase game in which the player scores points by guiding a central figure through various passageways of a maze and at the same time avoiding collision with certain opponents or pursuit figures which move independently about the maze. Under certain conditions, the central figure may temporarily become empowered to chase and overtake the opponents, thereby scoring bonus points." *Atari*, 672 F.2d at 617. See *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967) (The court declined to extend copyright protection to the rules of a promotional game because the rules could only be expressed in a very limited number of ways. If the rules were copyrighted, the owner of the copyright would also appropriate the substance of the game, preventing others from using the idea.).

105. *Atari*, 672 F.2d at 617.

106. *Id.* at 618.

107. *Id.* at 617-18.

Similarly, *Krofft* involved the “non-real world” characters and locale which comprised the authors’ expression.<sup>108</sup> Sid & Marty Krofft alleged that the defendant, McDonalds, had infringed their copyright in the H.R. Pufnstuf television series with its McDonaldland commercials. The Ninth Circuit applied its own extrinsic/intrinsic test for substantial similarity,<sup>109</sup> concluding that a jury could find McDonalds had copied the expressive elements of the Pufnstuf show in their McDonaldland television commercials.<sup>110</sup> The expressive elements were the “non-real world” characters and locale which were solely the creation of the original author. The court found that “complexity and artistry of the expression of an idea will separate it from even the most banal idea.”<sup>111</sup>

In comparing the commercials to the video games involved in *Atari* and the television commercial in *Krofft*, the *Blore* court made a broad leap in concluding that “the expressive aspects of the Blore commercials extend[ed] to the individual artistic choices such as a particular montage style, camera angle, framing, hairstyle, jewelry, decor, makeup and background.”<sup>112</sup> Although the disputed works in both *Atari* and *Krofft* were audiovisual, they are easily distinguished from *Blore*. Unlike both *Atari* and *Krofft*, *Blore* did not involve the expression of “non-real world” characters and locale. The only character in the Blore commercials is Deborah Shelton, who cannot be the subject of copyright protection.<sup>113</sup>

If the *Blore* court had applied the abstractions test used in *Atari*, it could have accurately described Blore’s commercials in fairly abstract terms: a rapid edit style commercial, using closeups of a celebrity spokesperson to tout a particular product. Therefore, under the abstractions test, the copying would have been only of idea and not expression.

The court, instead, applied the Ninth Circuit extrinsic/intrinsic test formulated in *Krofft*. Admitting the difficulty in “[a]pplying the intrinsic

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108. *Krofft*, 562 F.2d at 1167 n.9.

The “Living Island” locale of Pufnstuf and “McDonaldland” are both imaginary worlds inhabited by anthromorphic plants and animals and other fanciful creatures. . . . The characters are also similar. Both lands are governed by Mayors who have disproportionately large round heads dominated by long wide mouths. They are assisted by “Keystone cop” characters. Both lands feature strikingly similar crazy scientists and a multi-armed evil creature. It seems clear that such similarities go beyond merely that of the idea into the area of expression. The use of the basic idea of the works does not inevitably result in such similarities.

*Id.*

109. *Id.* at 1165-67.

110. *Id.* at 1169.

111. *Id.* at 1168.

112. *Blore*, 674 F. Supp. at 677.

113. *Id.* at 676 (“[c]opyright protection subsists . . . in original works of authorship . . .” (quoting 17 U.S.C. § 102(a)(1982))).

test to the nontextual elements of a thirty second television commercial[ ],"<sup>114</sup> the *Blore* court relied heavily on the "total concept and feel" of the commercials.<sup>115</sup> Whether this concept stands alone or is part of the intrinsic test is unclear. In either case, the "total concept and feel" element is ambiguous. The court offers no definition of what constitutes "total concept and feel."<sup>116</sup> Providing that this element is capable of definition, concepts, like ideas, are not copyrightable.<sup>117</sup>

In comparing these three cases involving audiovisual works, the court should have reached the conclusion, under the abstractions test, that the expression in the *Blore* commercials is indistinguishable from the idea. Therefore, near identical copying of the commercials would be required before infringement could be found,<sup>118</sup> and the court should have granted the defendants' motion for summary judgment. However, by applying the Ninth Circuit test, the court avoids expert analysis and dissection in the extrinsic test. Therefore, the court never looks at the protectable expression of the works and is unable to grant the defendants' motion for summary judgment. In addition, because of the brevity of the television commercials, the court cannot apply the intrinsic portion of the test. Instead, its decision is based on the nebulous "total concept and feel" of the commercials.

### B. Comparing Audiovisual Works to Photographs

The *Blore* court looked for additional support by comparing the case to *Kisch v. Ammirati & Puris, Inc.*,<sup>119</sup> which involved copyright protec-

114. *Blore*, 674 F. Supp. at 679.

115. *Id.* at 679-80.

116. Professor Nimmer wrote:

It has been said that where both the plaintiff's and defendant's works are intended for children, "in addition to the essential sequence of events we might properly consider the 'total concept and feel' of the works in question." This was intended as an alternative, not an additional standard to be satisfied in finding substantial similarity of expression. It should not be understood to mean that what would otherwise constitute an actionable similarity is rendered defensible because of a different "concept and feel."

3 M. NIMMER, *supra* note 68, § 13.03[A], at 13-30 to -31.

117. 17 U.S.C. § 102(b) (1988): "In no case does copyright protection for an original work of authorship 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 in such a work." *Id.*

118. *Krofft*, 562 F.2d at 1167. "When the idea and its expression are thus inseparable, copying the expression will not be barred, since protecting the expression in such circumstances would confer a monopoly of the idea upon the copyright owner free of the conditions and limitations imposed by the patent law." *Id.* at 1168 (quoting *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971)).

119. 657 F. Supp. 380 (S.D.N.Y. 1987).

tion for photographs. In *Kisch*, the plaintiff alleged that the defendants' photograph, used in an advertisement for Rose's Lime Juice, infringed the copyright in his photograph.<sup>120</sup>

The differences between the two photographs included: the plaintiff's photograph was in black and white while defendants' was in color; plaintiff's photograph was of an unidentified woman while defendants' was of a musician, John Lurie; the woman in the plaintiff's photograph was holding a concertina while John Lurie was holding a saxophone; and a bottle of lime juice and a portion of a table appeared in only the defendants' photograph.<sup>121</sup> The similarities between the photographs were as follows:

Most noticeably, the two photographs were taken in the same small corner of the Village Vanguard nightclub. The same striking mural appears as the background for each photograph. Both John Lurie and the woman in the plaintiff's photograph are seated and holding a musical instrument. . . . [T]he lighting, camera angle and camera position appear to be similar in each photograph.<sup>122</sup>

The *Kisch* court denied the defendants' motion for summary judgment.<sup>123</sup> The court held that "a rational trier of fact would be permitted to find that the underlying tone or mood of defendants' photograph was similar to the original conception expressed in plaintiff's work."<sup>124</sup> The court arrived at this conclusion using the Second Circuit test.<sup>125</sup> Under the extrinsic test, similarities relating to the idea<sup>126</sup> included using the same lighting, the same camera angle and position, the same nightclub and background, and using a subject seated and holding an instrument. The underlying tone or mood of defendants' photograph constituted the "illicit" copying of expression under the intrinsic test.<sup>127</sup>

The aspects the *Blore* court found to be expressive included "montage style, camera angle, framing, hairstyle, jewelry, decor, makeup and

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120. *Id.* at 381.

121. *Id.* at 384.

122. *Id.*

123. *Id.*

124. *Kisch*, 657 F. Supp. at 384.

125. *Id.* at 382-83 (citing *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946)). For a description of the Second Circuit test see *supra* text accompanying note 81.

126. When the Second Circuit, in *Arnstein*, "refers to 'copying' which is not itself an infringement, it must be suggesting copying merely of the work's idea, which is not protected by the copyright. To constitute an infringement, the copying must reach the point of 'unlawful appropriation,' or the copying of the protected expression itself." *Sid & Marty Krofft Television Prod. v. McDonald's Corp.*, 562 F.2d 1157, 1165 (9th Cir. 1977).

127. *Kisch*, 657 F. Supp. at 384.



background.”<sup>128</sup> These are the same elements which the *Kisch* court found related merely to the idea of the photographs. Had the *Blore* court used the Second Circuit test, as applied in *Kisch*, the result would be a finding that these aspects were only ideas under the extrinsic portion of the test.

*Kisch* is less helpful when applying the intrinsic portion of the test. Noting the difficulty involved in the application of the ordinary observer test,<sup>129</sup> the court simply decided that a rational trier of fact could find that the underlying tone or mood of the works were similar.<sup>130</sup> *Blore* cited *Kisch* merely to support its reliance on the total concept and feel of the commercials as the inevitable consequence of applying the intrinsic test.

Arguably a “total concept and feel” or “underlying tone or mood” test may be useful as applied to photographs. Since the subject of a photograph<sup>131</sup> and such devices as camera angle, camera position, lighting, and background merely relate to the idea of the photograph and as such are not protected by copyright, arguably the artists’ expression lies in the nebulous penumbra of “total concept and feel.” However, this argument suggests the importance of expert testimony and dissection in the extrinsic portion of the test so that the trier of fact does not become an art critic.<sup>132</sup> The *Blore* court noted one very important reason for avoiding comparisons between television commercials (audiovisual works) and photographs. “The expressive aspects of audiovisual works, and of television in particular, necessarily include *both* images and sounds since without either there can be no communication and hence no expression.”<sup>133</sup>

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128. *Blore*, 674 F. Supp. at 677.

129. *Kisch*, 657 F. Supp. at 383. “Comparison of two works involves a ‘closer inspection, more attentive to detail’ than a mere ‘generalized impression,’ but ‘still no more than could reasonably be expected of a lay’ or ordinary observer.” *Id.* (quoting *First American Artificial Flowers, Inc. v. Joseph Markovits, Inc.*, 342 F. Supp. 178, 186 (S.D.N.Y. 1972)). “Troublesome, too, is the fact that the same general principles are applied in claims involving plays, novels, sculpture, maps, directories of information, musical compositions, as well as artistic paintings.” *Kisch*, 657 F. Supp. at 383 (quoting *Franklin Mint Corp. v. National Wildlife Art Exchg.*, 575 F.2d 62, 65 (3d Cir. 1978)).

130. *Kisch*, 657 F. Supp. at 384.

131. As Justice Holmes stated in *Bleistein v. Donaldson Lithographing Co.*: “Others are free to copy the original. They are not free to copy the copy.” *Bleistein*, 188 U.S. at 249. This concept supports the idea that *Kisch* was incorrectly decided.

132. See *supra* note 92 and accompanying text.

133. *Blore*, 674 F. Supp. at 677 (emphasis added).

### C. Comparing Audiovisual Works with Motion Pictures

Motion pictures constitute a subcategory within the category of audiovisual works under the statute.<sup>134</sup> The *Blore* court cited *Time Inc. v. Bernard Geis Associates*<sup>135</sup> to support its proposition that elements of creativity include such choices as the kind of camera, film, lens, the area covered, the timing and the filming location.<sup>136</sup>

*Geis* was a copyright infringement action where the defendants allegedly copied the expressive elements of several frames<sup>137</sup> of the plaintiff's home movie of the John F. Kennedy assassination.<sup>138</sup> The defendants had drawn sketches from frames of the movie for his book, "Six Seconds in Dallas," a study of the Kennedy assassination.<sup>139</sup> The defendants contended that the movie lacked sufficient originality for copyright protection, because the subject of the movie was a news event, and news events may not be copyrighted.<sup>140</sup> The *Geis* court found that the plaintiff's work contained many elements of creativity, making it sufficiently original for copyright protection.<sup>141</sup> However, the court granted summary judgment for the defendants based on their claim of "fair use."<sup>142</sup>

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134. 17 U.S.C. § 102(a)(6) (1982). The problem in comparing a television commercial with a motion picture is that the brevity of the television commercial (approximately thirty seconds) substantially precludes the development of specific plots or characters. *Miller Brewing Co. v. Carling O'Keefe Breweries of Canada, Ltd.*, 452 F. Supp. 429, 441 (W.D.N.Y. 1978). Thus, the ordinary reasonable person standard for finding substantial similarity of expression may be unfair because the television commercial audience is somewhat less discriminating than the motion picture audience. "Television commercials as the United States Court of Appeals for the Seventh Circuit noted with respect to video games, 'unlike an artist's painting or even other audiovisual works, appeal to an audience that is fairly indiscriminating insofar as their concern about more subtle differences in artistic expression.'" *Blore*, 674 F. Supp. at 680 (citing *Atari, Inc. v. North American Philips Consumer Elec. Corp.*, 672 F.2d 607, 619 (7th Cir. 1982)).

135. 293 F. Supp. 130 (S.D.N.Y. 1968).

136. *Blore*, 674 F. Supp. at 677.

137. "Frame" refers to each separate photograph in a series. "A motion picture consists of a series of photographs showing the objects in a scene in successive positions slightly changed." *Geis*, 293 F. Supp. at 132.

138. *Id.* at 138-39.

139. *Id.* at 131.

140. *Id.* at 143.

141. *Id.*

142. *Geis*, 293 F. Supp. at 146. The concept of fair use applied in *Geis* was derived from H.R. 2512, 90th Cong., 1st Sess. § 107 (1967), a bill for the general revision of the copyright laws.

#### Limitations on exclusive rights: Fair Use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In

Because the allegedly infringing works were the artist's sketches of specific frames of the plaintiff's film, the *Geis* court treated the case under the pictorial, graphic and sculptural works category of the statute.<sup>143</sup> The court stated that the author's artistic choices constituted sufficient *originality* to entitle the work to copyright protection. The court did not, however, decide whether they could sufficiently separate these artistic choices from the ideas to reach the issue of unlawful appropriation. In addition, the *Geis* case is factually inapposite to *Blore* because it involved a news event and accordingly, turned on the issue of fair use. Citing *Geis* for support, the *Blore* court avoided the difficult issue of separating idea from expression.

#### D. *Miller Gets Canned*

Duling and 20/20 relied on *Miller Brewing Co. v. Carling O'Keefe Breweries of Canada, Ltd.*,<sup>144</sup> to support their position. *Miller* was a copyright infringement action between the producers of television beer commercials.<sup>145</sup> The four Miller commercials are set in a tavern and use famous personalities to promote Miller's "LITE" beer. Each ends with a closeup of the bottle, can, and frosty mug trio.<sup>146</sup> Carling, the defendant,

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determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

- (1) the purpose and character of the use;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (1982).

143. *Geis*, 293 F. Supp. at 143. For a discussion of the problems involved in comparing an audiovisual work with a pictorial work, see *supra* text accompanying note 132.

144. 452 F. Supp. 429 (W.D.N.Y. 1978).

145. *Id.* at 434. The plaintiff's (Miller) commercials were primarily shown in the United States and Alberta, Canada. The defendant's (Carling) commercials were shown primarily in Canada, but commercials were also run in Buffalo, New York, because such transmissions were received by television viewers in Ontario either directly or through cable television systems and because of cost efficiency (such stations reach a larger audience than Canadian stations).

146. *Id.* at 435. In the "Mackey-Snell" commercial, two men are arm wrestling while Mackey addresses the camera and informs the audience that LITE is less filling and tastes great. Both men then recite in unison that "in fact after I teach this guy a lesson, I'm going to have another bottle." The camera immediately focuses on a closeup of the familiar trio of bottle, can and foamy-headed glass of beer, a groan is heard at the end of the arm wrestling duel, and the announcer's voice reads the words emblazoned across the screen: "LITE beer from Miller. Everything you always wanted in a beer. (Pause) And less."

In the "Rudolph-Heinsohn" commercial, after Heinsohn notes his frequent basketball game disagreements with Rudolph, he acknowledges that they finally agree on something: LITE beer from Miller. They quickly digress into an argument over LITE's attributes (less

produced three television commercials to promote their "HIGHLITE" beer. The Carling commercials did not employ famous personalities; however, Carling filmed them in a tavern and used the same concluding format of bottle, can, and frosty mug.<sup>147</sup>

Carling alleged that the idea of the Miller commercials was to use famous personalities in rather absurd situations—arguing and reciting verse about light beer—and that the expression of the commercials "are the actual words used by the characters and the characters themselves (famous athletes)."<sup>148</sup> The court agreed, finding that Carling had only copied the ideas or themes of the Miller commercials and not the protectable expression.<sup>149</sup>

The *Blore* case is factually similar to *Miller*. The subjects in both cases were commercials. The advertising was done in the same medium (television), making the two "audiovisual" cases more comparable.<sup>150</sup> The commercials compared in *Blore* and those compared in *Miller* involved different text while employing the same format.<sup>151</sup> Additionally, the defendants in both cases alleged that the expression of the commercials was indistinguishable from their ideas and thus could not be the

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filling or tastes great). The same concluding format is utilized with the announcer's voice heard as the camera focuses on the trio of bottle, can and frosty beer glass.

In the third commercial, football player, Deacon Jones, strolls menacingly through a bar as the crowd parts in his path. He then poetically relates LITE's beneficial characteristics ending with a threat to break a nose if no one believes him. The commercial ends with the familiar concluding format.

The last commercial employs the Van Arsdale twins to recite the commercial's message in unison. A disagreement arises over the tastes great, less filling attributes, resulting in utter confusion between them as to each's identity. Again, the audience sees the same concluding format.

147. *Id.* at 436. The first commercial shows two unidentified arm wrestlers. One tells the other that HIGHLITE is brewed like a regular beer. The other responds that HIGHLITE tastes less filling. The statements are repeated and in the interim, the camera focuses on two bottles of HIGHLITE as a third man sits down between the arm wrestlers. He points out that they both drink HIGHLITE because it tastes great and has fewer than seventy calories per bottle. The arm wrestlers agree momentarily, but lapse into an argument over who will buy the next round of beer. A closeup follows, showing a HIGHLITE bottle next to a full glass of beer, and the announcer exclaims that HIGHLITE is "a new lite beer for all kinds of reasons."

In Carling's "delivery man" commercial, a gregarious fellow joins his friends at a table in a tavern and recites a poem revealing the attributes of HIGHLITE. This brings forth a roar from the crowd. The familiar closing follows. In the "McCluskey brothers" commercial, the three brothers stand arm in arm while each relates a message of why he drinks HIGHLITE. Jim then lifts the other two brothers off the ground by the back of their shirts and the same ending follows.

148. *Id.* at 440.

149. *Miller*, 452 F. Supp. at 440.

150. See *supra* text accompanying note 133.

151. *Blore*, 674 F. Supp. at 675; *Miller*, 452 F. Supp. at 437-38 (all of the commercials involved had similar ending formats using closeups of bottles, cans and frosty glasses).

subject of copyright protection.<sup>152</sup>

The court in *Blore* rejected the *Miller* case as only tangentially related to the suit between *Blore* and 20/20.<sup>153</sup> The court described the copyright issue in *Miller* as centered on the literary, rather than the audiovisual, aspects of the commercials.<sup>154</sup> The *Miller* court stated that “[t]he use of arm wrestling in Miller’s Mackey-Snell commercial does not express the theme that LITE is less filling and still tastes great. It is merely used as a *vehicle for placing characters in context*.”<sup>155</sup> In finding the ideas or themes of the commercials indistinguishable from their expression, the *Miller* court used the scenes a faire test, which is often used in analyzing literary works.

However, courts apply the “scenes a faire” test to determine whether an author’s expression can be separated from his ideas. The test is not used solely to analyze literary works. In fact, the *Atari* court, another case the *Blore* court cited for support, used both scenes a faire and the abstractions test in its attempt to separate idea from expression.<sup>156</sup> Additionally, the court ignored certain nonliterary aspects, such as using the common ending format of the *Miller* and *Carling* commercials and the closeups of the bottle, can, and frosty glass trio. Thus, the *Blore* court erred by failing to place more weight on the *Miller* case.

## VII. CONCLUSION

Advertising is undoubtedly a proper subject for copyright protection. However, copyright does not protect against the borrowing of abstract ideas contained in copyrighted works. The author’s protection is limited to his individual “expression” of abstract ideas.

While theoretically sound, the principle of separating ideas from their expression is problematic. Several tests have been formulated, reformulated, misinterpreted, and misapplied in the attempt to draw this line.

The Ninth Circuit test formulated in *Krofft* is particularly problematic. Courts’ failure to recognize the importance of allowing expert testimony and dissection in separating ideas from expression creates confusion. The confusion is particularly evident in *C. Blore & D. Richman, Inc. v. 20/20 Advertising*. The *Blore* court failed to separate ideas

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152. *Blore*, 674 F. Supp. at 676; *Miller*, 452 F. Supp. at 440.

153. *Blore*, 674 F. Supp. at 678.

154. *Id.*

155. *Miller*, 452 F. Supp. at 440 (emphasis added).

156. *Atari, Inc. v. North American Philips Consumer Elec. Corp.*, 672 F.2d 607, 615 (7th Cir. 1982). See *supra* note 103 and accompanying text.

from expression before applying the ordinary observer test. This failure contributed to the court's inability to recognize that the expression in the *Blore* commercials was indistinguishable from the ideas and, therefore, not protected by copyright. Ultimately, the *Blore* court relied on the ambiguous "total concept and feel" of the commercials to deny the defendants' motion for summary judgment.

This case is a perfect illustration of Professor Nimmer's criticism of the Ninth Circuit test as formulated in *Krofft*. By not allowing expert testimony and dissection in the extrinsic portion of the test to distill the author's expression from the unprotected ideas, the court is unnecessarily restrained from ruling for the defendants in advance of trial. Nimmer's criticism stems from the belief that *Krofft* misinterprets the Second Circuit test, developed in *Arnstein*, as not requiring any separation of idea and expression in the extrinsic test.<sup>157</sup> Although *Krofft* stated that the Ninth Circuit's articulation of the rule is not dependent on its reading of *Arnstein*, "in the interest of justice and of avoiding nuisance litigation, it is to be hoped that future decisions will view the scope of the extrinsic test as that suggested by *Arnstein* rather than that adopted in *Krofft*."<sup>158</sup>

*Karen L. Poston*

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157. 3 M. NIMMER, *supra* note 68, § 13.03[E], at 13-59 to -60.

158. *Id.* § 13.03[E], at 13-60.

