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SUBSTANTIAL SIMILARITY IN THE NINTH CIRCUIT: A  
"Virtually Identical" "Look and Feel"? *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435 (9th Cir. 1994)

Rodger R. Cole†

After nearly seven years,<sup>1</sup> the Apple-Microsoft litigation over personal computer graphic user interfaces came to an end in February 1995 when the Supreme Court denied certiorari to Apple in the *Apple Computer, Inc. v. Microsoft Corporation* decision of the Court of Appeals for the Ninth Circuit.<sup>2</sup> The decision provides another factual example for attorneys seeking insight into the analysis of the Court of Appeals for the Ninth Circuit on copyright issues relating to 'substantial similarity' and 'look and feel'. After *Apple Computer*, if a claim for copyright protection is based on the "look and feel" of individual unprotected elements of expression, the protection given the copyright is "thin" and infringement will be found only if the two expressions are "virtually identical."<sup>3</sup> The Ninth Circuit held that the district court had "properly identified the sources of similarity . . ., determined which were licensed, distinguished ideas from expression, and decided the scope of Apple's copyright by dissecting the unauthorized expression and filtering out unprotectable elements" and "correctly concluded that illicit copying could occur only if the works as a whole are virtually identical."<sup>4</sup>

I. BACKGROUND

The Apple Macintosh's graphic user interface was responsible for much of the commercial success of that computer in the 1980s.<sup>5</sup> After the release of Microsoft Windows 1.0 in 1985, Apple notified Microsoft of its belief that Windows 1.0 infringed Apple's audiovisual

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1. Apple Computer, Inc. ("Apple") filed the copyright infringement suit against Microsoft Corporation ("Microsoft") and Hewlett-Packard Company ("HP") on March 17, 1988. *Apple Computer, Inc. v. Microsoft Corp.*, 799 F. Supp. 1006, 1015 (N.D.Cal. 1992) [*Apple V*].

2. *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435 (9th Cir. 1994), *cert. denied*, 130 L. Ed. 2d 1129 (1995) [*Apple Computer*].

3. *Id.* at 1442.

4. *Id.* at 1447.

5. *Apple V*, 799 F. Supp. at 1017.

copyrights in graphic user interfaces.<sup>6</sup> Apple and Microsoft negotiated an agreement ("1985 Agreement") that was entered into on November 22, 1985.<sup>7</sup> In the 1985 Agreement, Microsoft acknowledged that the "visual displays" in Windows 1.0 were "derivative works"<sup>8</sup> of the Apple graphic user interface. Apple granted Microsoft a non-exclusive license to use the visual displays in Windows 1.0 in "present and future software programs."<sup>9</sup> Microsoft granted Apple a five year, non-exclusive license to use any visual displays created by Microsoft, while agreeing to delay the release of its Excel program for IBM compatible personal computers and to release an improved version of Microsoft Word for the Macintosh.<sup>10</sup>

After reaching the 1985 Agreement with Apple, Microsoft granted a license to Hewlett-Packard ("HP") to use the Windows 1.0 software that eventually led to HP's New Wave software.<sup>11</sup> Upon the release of the Windows 2.03 and the New Wave software, Apple filed the copyright infringement suit against Microsoft and HP that led to the 1994 Ninth Circuit decision.<sup>12</sup> Apple claimed infringement of seven audiovisual copyrights<sup>13</sup> covering graphic user interfaces of the Macintosh.<sup>14</sup>

## II. THE SCOPE OF THE COPYRIGHT

To establish a copyright infringement claim, any plaintiff must show ownership of a valid copyright and unauthorized copying of the protected expression. Since direct evidence of copying is rare, copying can be proven circumstantially by showing access plus substantial similarity to the infringed work.<sup>15</sup> Microsoft and HP did not dispute

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6. *Apple Computer, Inc. v. Microsoft Corp.*, 709 F. Supp. 925, 926 (N.D.Cal. 1989) [*Apple I*].

7. *Id.*

8. The Copyright Act defines a "derivative work" as "a work based upon one or more preexisting works, such as a translation, . . . , condensation, or any other form in which a work may be recast, transformed, or adapted." 17 U.S.C. § 101 (1988).

9. *Apple I*, 709 F. Supp. at 927.

10. *Id.*

11. *Apple Computer, Inc. v. Microsoft Corp.*, 759 F. Supp. 1444, 1448 (N.D.Cal. 1991) [*Apple III*]. The details of the licensing agreement between Microsoft and HP are unclear.

12. Upon the release of Windows 3.0 and New Wave 3.0 Apple filed a supplemental complaint on June 28, 1991. *Apple V*, 799 F. Supp. at 1016. After argument on the issue, the district court decided that the previous determinations on the scope of protectability would apply equally to the supplemental complaint. *Id.* at 1042.

13. Audiovisual works are explicitly mentioned as the type of original authorship falling within the scope of the Copyright Act. 17 U.S.C. § 102(a)(6) (1988).

14. *Apple V*, 799 F. Supp. at 1015.

15. *Sid & Marty Krofft TV Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977); *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1472 (9th Cir. 1992),

either "Apple's ownership of valid copyrights" or "access to Apple's copyrighted works."<sup>16</sup> The only issue for the district court was "whether defendants' works are substantially similar in both ideas and expression to warrant a finding of infringement."<sup>17</sup>

A series of decisions by the district court in response to summary judgment motions of the parties had a decisive impact on the court's ultimate substantial similarity analysis. In the first published decision, the issue was whether the alleged similarities between Windows 2.03 and the Macintosh Graphical User Interface were within the scope of the 1985 Agreement, and thus a complete defense to the infringement claims.<sup>18</sup> The district court interpreted the term "visual displays" in the 1985 Agreement to mean the individual elements that existed in Windows 1.0.<sup>19</sup> The court found that the licensing agreement could be a partial defense to the extent that every visual display in Windows 2.03 that was in Windows 1.0 was covered by the 1985 Agreement and not subject to infringement claims.<sup>20</sup> The license defense was also available to HP since HP was a licensee of Microsoft.<sup>21</sup>

This decision and the 1985 Agreement, generally, were critical to the ultimate resolution of the substantial similarity analysis in two ways. Specifically, since the court found most of the alleged similarities in Windows 2.03 to be covered by the 1985 Agreement, these similarities were excluded in the dissection process.<sup>22</sup> More generally, the analysis of the term "visual displays" in the 1985 Agreement set a tone of analysis for the case that remained throughout.<sup>23</sup> The district court's analysis consistently centered on the individual visual displays, rather than the overall look and feel.<sup>24</sup>

The second published opinion interpreted the scope of the "visual displays" covered in Windows 1.0 and the 1985 Agreement to ascertain if, and to what extent, the 1985 Agreement licensed the visual

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*cert. denied*, 113 S. Ct. 198 (1992); *Data East USA, Inc. v. Epyx, Inc.*, 862 F.2d 204, 206 (9th Cir. 1988); *Frybarger v. IBM*, 812 F.2d 525, 529 (9th Cir. 1987).

16. *Apple Computer, Inc. v. Microsoft Corp.*, 821 F. Supp. 616, 619 (N.D.Cal. 1993) [*Apple VI*].

17. *Id.*

18. *Apple I*, 709 F. Supp. at 927.

19. *Id.* at 930.

20. *Id.* at 931-2.

21. *Apple Computer, Inc. v. Microsoft Corp.*, 717 F. Supp. 1428, 1434 (N.D.Cal. 1989) [*Apple II*]. See also *Apple VI*, 821 F. Supp. at 627.

22. *Apple II*, 717 F. Supp. at 1432.

23. *Apple III*, 759 F. Supp. at 1449. "The first two published opinions were rendered by Hon. William S. Schwarzer; after his appointment as Director of the Federal Judicial Center, this matter was reassigned to the calendar of Hon. Vaughn R. Walker." *Apple Computer*, 35 F.3d at 1438 n.2.

24. *Apple III*, 759 F. Supp. at 1449.

displays in Windows 2.03.<sup>25</sup> The court made two important findings. First, anything covered by the 1985 Agreement was going to be excluded in the analytical dissection process. "[W]here a work includes licensed features as well as unlicensed features, infringement depends on whether the unlicensed features are entitled to protection; licensed features are treated as being in the public domain."<sup>26</sup>

The second critical finding of the court was that the 1985 Agreement licensed everything in Windows 2.03 "except for those relating to the use of overlapping main application windows, as opposed to tiled main application windows, and except for the specified changes in the appearance and manipulation of icons."<sup>27</sup> This drastically limited the amount of copyrightable expression Apple could claim in the substantial similarity analysis. At this point, the district court expected to "determine whether the use of those unlicensed visual displays infringes Apple's audiovisual copyrights."<sup>28</sup>

In the course of the litigation Apple hit another stumbling block. Apple moved for summary judgment on the affirmative defense of fraud on the Copyright Office raised by HP and the affirmative defense of lack of originality raised by Microsoft and HP.<sup>29</sup> HP alleged that Apple failed to disclose pre-existing works to the Copyright Office. Specifically, HP alleged that Apple failed to disclose visits to Xerox Corporation's Palo Alto Research Center that provided exposure to pre-existing work on graphic user interfaces.<sup>30</sup> Although HP showed that "the Apple Lisa/Macintosh graphic user interface was strongly influenced by the Xerox programs, Smalltalk and Star"<sup>31</sup> the court found that HP had failed to establish an intent on Apple's part to perpetrate fraud on the Copyright Office.<sup>32</sup>

The court also found in Apple's favor on the issue of originality. Despite any previous knowledge of Xerox's work, the court found that Apple's Lisa and Macintosh expression fulfilled the minimal degree of creativity to satisfy the originality requirement for the Copyright Act.<sup>33</sup> However, the court severely restricted the impact of this deci-

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25. *Apple II*, 717 F. Supp. at 1430.

26. *Id.* at 1432.

27. *Id.* at 1435.

28. *Id.*

29. *Apple III*, 759 F. Supp. at 1453.

30. *Apple V*, 799 F. Supp. at 1017.

31. *Apple III*, 759 F. Supp. at 1454.

32. *Id.* at 1455.

33. *Id.* Section 102(a) of the Copyright Act only protects "original works of authorship." 17 U.S.C. § 102(b) (1988). After Justice O'Connor's opinion in *Feist Publications v. Rural Telephone Service*, the originality requirement appears to be Constitutionally mandated. 499 U.S. 340, 346 (1991).

sion on Microsoft and HP's motion to reconsider the originality affirmative defense. The court, in the fourth published opinion, granted the motion to reconsider "to the extent that the lack of original expression of a component element shall be relevant to the scope of protection and substantial similarity analyses."<sup>34</sup> This decision turned out to be critical for Microsoft and HP when the court performed analytic dissection under the extrinsic test since many of the elements claimed to be protectable by Apple were found to lack originality.<sup>35</sup>

### III. SUBSTANTIAL SIMILARITY IN THE NINTH CIRCUIT

The determination that two works are substantially similar is a difficult one.<sup>36</sup> Historically, the Ninth Circuit struggled with the question of when there was copying of protectable expression of an idea as opposed to copying of an unprotected idea itself.<sup>37</sup> "No one infringes, unless he descends so far into what is concrete [in a work] as to invade . . . [its] expression." (Cite omitted.) Only this expression may be protected and only it may be infringed."<sup>38</sup> It took a controversy that only Mayor McCheese could stir up for the Ninth Circuit to spell out the extrinsic-intrinsic analysis of substantial similarity in *Sid & Marty Krofft TV Productions, Inc. v. McDonald's Corporation*.<sup>39</sup>

Referring to Judge Learned Hand's "abstraction test"<sup>40</sup> the court felt that "two steps in the analytic process are implied by the requirement of substantial similarity."<sup>41</sup> The first is an analysis of whether there is substantial similarity in the ideas of the works — the extrinsic test.<sup>42</sup> "It is extrinsic because it depends . . . on specific criteria which can be listed and analyzed. Such criteria include the type of artwork involved, the materials used, the subject matter, and the setting for the subject. . . . [A]nalytic dissection and expert testimony are appropriate."<sup>43</sup>

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34. *Apple Computer, Inc. v. Microsoft Corp.*, 779 F. Supp. 133, 135 (N.D. Cal. 1991) [*Apple IV*].

35. *See Apple V*, 799 F. Supp. 1006 (N.D. Cal. 1992).

36. *Krofft*, 562 F.2d at 1162. The question of "substantially" has been one that has been open to wide interpretations in the past.

37. *Id.* at 1163.

38. *Id.*

39. *Id.* at 1166. The *Krofft* case was initiated upon McDonald's use of characters in their advertising campaigns that were ultimately found to infringe upon the copyrights of several characters developed by the Kroffts.

40. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2nd Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

41. *Krofft*, 562 F.2d at 1163-4.

42. *Id.* at 1164. "The test for similarity of ideas is still a factual one, to be decided by the trier of fact . . . [However], this question may often be decided as a matter of law." *Id.*

43. *Id.*

The second step is a determination of whether there is substantial similarity in the form of the expression in the work — the intrinsic test.<sup>44</sup> Analytic dissection and expert testimony are not relevant to the intrinsic test because the determination of substantial similarity under the intrinsic test is “the response of the ordinary reasonable person.”<sup>45</sup> This determination is “necessarily more subtle and complex.”<sup>46</sup> The Ninth Circuit believed this two-part analysis of substantial similarity is parallel to the copying-illicit copying analysis of the Court of Appeals for the Second Circuit.<sup>47</sup>

The Ninth Circuit has had the opportunity to apply the extrinsic-intrinsic analysis to computer interfaces several times. Two such examples are *Frybarger v. IBM*<sup>48</sup> and *Data East USA, Inc. v. Epyx, Inc.*<sup>49</sup> In both cases the Court of Appeals for the Ninth Circuit found no copyright infringement claim could be upheld.

In *Data East USA*, Data East brought suit for infringement of its game “Karate Champ” against Epyx for its game “World Karate Championship.”<sup>50</sup> The Ninth Circuit reversed the district court’s finding of infringement.<sup>51</sup> The Ninth Circuit held that the fifteen features of “Karate Champ” that the district court found to be infringed by “World Karate Championship” were indispensable to the idea of karate itself, and subsequently not protected by the Copyright Act.<sup>52</sup> Citing *Krofft*, the *Data East USA* court set forth the level of similarity required to find infringement when unprotectable elements of expression are alleged to be infringed: “When idea and expression coincide, there will be protection against nothing other than identical copying.”<sup>53</sup>

Similarly, in *Frybarger* the Ninth Circuit affirmed the district court’s findings that the alleged similarities claimed were unprotectable.<sup>54</sup> Each of the similar features were found to be indispensable to the expression, and thus not protected by the copyright laws under the

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44. *Id.*

45. *Id.*

46. *Krofft*, 562 F.2d at 1164.

47. *Arnstein v. Porter*, 154 F.2d 464, 468-9 (2nd Cir. 1946), *cert. denied*, 330 U.S. 851 (1947).

48. 812 F.2d 525 (9th Cir. 1987).

49. 862 F.2d 204 (9th Cir. 1988).

50. *Id.* at 205-6.

51. *Id.* at 210.

52. *Id.* at 209. The Copyright Act, consistently with the accepted scope of copyright laws, expressly excludes an “idea” as being within the purview of copyright protection. 17 U.S.C. § 102(b) (1988).

53. *Data East USA*, 862 F.2d at 209, *Krofft*, 562 F.2d at 1168.

54. *Frybarger*, 812 F.2d at 529.

*scenes-a-faire* doctrine.<sup>55</sup> The Ninth Circuit dispensed of the substantial similarity claims by citing *Krofft* for the standard that "indispensable expression of . . . ideas . . . may be protected only against virtually identical copying."<sup>56</sup> Because no reasonable jury could conclude that the expression was virtually identical, the Ninth Circuit affirmed the lower court's granting summary judgment.<sup>57</sup>

Cases like these eventually led the Ninth Circuit to explicitly state that the extrinsic test had evolved to involve an analysis of both the substantial similarity between ideas of the works and an analysis of the protectable expression of the work alleged to be infringed.<sup>58</sup> In *Brown Bag*, Brown Bag Corporation sued Symantec Corporation for copyright infringement of a software outlining program. The district court analyzed the alleged similarities of the two works under the extrinsic test and determined that the similarities were either not protected by copyright laws or were properly licensed.<sup>59</sup> On appeal Brown Bag argued that this was improper dissection under the extrinsic test. The Ninth Circuit disagreed with Brown Bag's argument.<sup>60</sup> The Ninth Circuit expressly acknowledged the "evolution" of the extrinsic test to analyze both ideas and expression.<sup>61</sup> There are two issues to be determined under the extrinsic test's analytical dissection: the alleged substantial similarity between the ideas in the expression and the protectability of that expression.<sup>62</sup> The second issue has "the purpose of defining the scope of plaintiff's copyright."<sup>63</sup> If the claimed expression is not protectable, the scope of the copyright is limited accordingly.<sup>64</sup>

The question *Brown Bag* did not explicitly answer, but previous cases such as *Frybarger* and *Data East USA* had hinted at, was the impact that limiting the scope of the copyright had on the analysis under the intrinsic test.<sup>65</sup> This question was answered in *Apple Computer*. When the copyright claimed is subjected to dissection under the extrinsic test and the analytic dissection has led to the conclusion

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55. *Id.* at 530.

56. *Id.*

57. *Id.*

58. *Brown Bag*, 960 F.2d at 1475.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 1475-6.

63. *Brown Bag*, 960 F.2d at 1476.

64. *Id.*

65. *Id.* Brown Bag argued on appeal that the district court had not performed, or neglected, the intrinsic analysis of the overall look and feel of the programs. The Ninth Circuit did not address the issue because the record reflected that Brown Bag's counsel had never made any such request of the district court. *Id.*



that the individual elements of expression claimed are not protected by copyright laws, the protection given the overall look and feel of the expression is thin and in order to find infringement the works must be virtually identical.<sup>66</sup>

#### IV. DISSECTING *APPLE COMPUTER*

The beginning of the dissection of Apple's copyrights came long before the district court officially embarked upon any substantial similarity analyses. When determining the scope of the 1985 Agreement, the court requested Apple to submit a list of alleged similarities. Apple produced a list of 189 similarities with Windows 2.03 and 147 similarities with New Wave 2.0.<sup>67</sup> The district court found that 179 of the 189 similarities with Windows 2.03 and 93 of the 147 similarities with New Wave 2.0 were licensed by the 1985 Agreement.<sup>68</sup>

Following lengthy discovery, there was "a deluge of summary judgment motions: two by Apple, seven from Microsoft and nine by HP."<sup>69</sup> The district court planned on hearing arguments on the similarities of the non-licensed items on Apple's list of similarities. Apple attempted to avoid having the argument focus on a few similarities by "[s]ticking stubbornly to a 'look and feel' or 'gestalt' theory" of the copyright protection.<sup>70</sup> After Apple did not address Microsoft and HP's specific arguments on the unlicensed similarities that were listed, the court went forward with the dissection and determined that none of the ten unlicensed similarities with Windows 2.03 were protectable and only one similarity with New Wave was protectable.<sup>71</sup> Predictably, Apple moved for reconsideration and addressed Microsoft and HP's arguments specifically.<sup>72</sup>

Rejecting Apple's claim of "a copyrightable arrangement — a 'look and feel' which constitutes protectable expression apart from its individual elements" the court identified five features of the graphic user interface to be dissected: overlapping windows, iconic representation, object opening/closing, menus, and iconic manipulation.<sup>73</sup> The court also analyzed the program manager, file manager, and colors

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66. *Apple Computer*, 35 F.3d at 1447.

67. *Apple V*, 799 F. Supp. at 1016.

68. *Id.*

69. *Id.*

70. *Id.* The district court appreciated Apple's "look and feel" arguments. The district court simply did not want to consider them while analytically dissecting the similar elements under the extrinsic test. The "look and feel" "test should be applied only after protectible expression has been identified, not before, as Apple would have this court do." *Id.* at 1026 n.16.

71. *Id.* at 1016-17.

72. *Apple V*, 799 F. Supp. at 1017.

73. *Id.* at 1022-24.

and fonts in Windows 3.0 for similarities to Apple's copyrights.<sup>74</sup> The district court went through a lengthy dissection of each individual element claimed within the above categories and determined that most were either licensed, merged under the idea-expression doctrine, an indispensable expression under the *scenes a faire* doctrine, unoriginal, and/or limited by the design of the hardware.<sup>75</sup> After subsequent arguments on the remaining items whose protectability was undecided, the court "determined that Microsoft's Windows consists only of elements that are either unprotectable, licensed, or protectible but lacking sufficient similarity to Apple's works."<sup>76</sup>

Despite this analytical dissection of Apple's copyright claims, the court still had to apply the intrinsic test since "works consisting largely of uncopyrightable elements are entitled to copyright protection, but receive only limited protection."<sup>77</sup> The limited protection given to the copyright is application of the virtual identity standard in the intrinsic analysis.<sup>78</sup> The court held that when "the work is capable of only a narrow range of expression" the virtual identity standard should be applied.<sup>79</sup>

The district court expected to proceed with the question of whether either the Microsoft or HP work as a whole was virtually identical to any of Apple's work.<sup>80</sup> When Microsoft and HP motioned for summary judgment for noninfringement due to lack of virtual identity, Apple did not oppose the motions and judgment was entered in favor of Microsoft and HP.<sup>81</sup> Apple appealed seeking reversal on two grounds: the 1985 Agreement should not have been a partial defense and that the district court's dissection was incorrect in eliminating unprotected elements from the comparison as a whole.<sup>82</sup>

The Court of Appeals for the Ninth Circuit agreed with the district court that the license granted by the 1985 Agreement must be the beginning point of the infringement analysis.<sup>83</sup> The Ninth Circuit also agreed with the district court's treatment of those individual elements that were covered by the license — "infringement will depend on whether the unlicensed features are entitled to protection"<sup>84</sup> — be-

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74. *Id.* at 1041-1046.

75. *Id.* at 1026-1046.

76. *Apple VI*, 821 F. Supp. at 623.

77. *Id.*

78. *Id.* at 625.

79. *Id.*

80. *Id.* at 631.

81. *Apple Computer*, 35 F.3d at 1438.

82. *Id.* at 1438-39.

83. *Id.* at 1440.

84. *Id.* at 1441.

cause Apple was required to prove unauthorized, unlicensed expression was copied.<sup>85</sup>

The Ninth Circuit read Apple's second argument on appeal consistently with the interpretation of the district court: "Apple wants an *overall comparison* of its works to the accused works for *substantial similarity* rather than virtual identity."<sup>86</sup> In rejecting Apple's claims, the Ninth Circuit approved of the lower court's handling of the extrinsic analytical dissection. "Because only those elements of a work that are protectable and used without the author's permission can be compared when it comes time to the ultimate question of illicit copying, we use analytic dissection to determine the scope of copyright protection before works are considered 'as a whole'."<sup>87</sup>

The Ninth Circuit affirmed the findings of the district court under the analytical dissection process. The Ninth Circuit found the district court's filtering of elements that were licensed, merged under the idea-expression doctrine, an indispensable expression under the *scenes a faire* doctrine, unoriginal, and/or limited by the hardware process was a proper dissection of the alleged similarities.<sup>88</sup>

The Court of Appeals also rejected Apple's argument that graphic user interfaces were unique audiovisual works that made analytical dissection improper. The Ninth Circuit found that analytical dissection applies equally to video games and computer interfaces as to any other type of copyrighted work.<sup>89</sup>

Despite the finding that the individual claimed elements were unprotectable, this "does not mean that at the end of the day, when the works are considered under the intrinsic test, they should not be compared as a whole."<sup>90</sup> The extrinsic test, by performing the dual role of identifying the substantially similar ideas and determining the appropriate scope of copyright protection, places the intrinsic test into context by providing an appropriate standard of similarity to find infringement.<sup>91</sup>

In *Apple Computer* the extrinsic test's dissection led to the conclusion that only "Apple's unique selection and arrangement of all of these features" was subject to protection from infringement.<sup>92</sup> This

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85. *Id.*

86. *Apple Computer*, 35 F.3d at 1442, (emphasis in original).

87. *Id.* at 1443.

88. *Id.* at 1445.

89. *Id.* at 1445.

90. *Id.* at 1446.

91. *Apple Computer*, 35 F.3d at 1446.

92. *Id.*

limited scope of copyrightability under the extrinsic test called for the virtual identity standard to be applied under the intrinsic test.<sup>93</sup>

The only question on appeal was the legal appropriateness of the virtual identity standard, not the merits of the virtual identity judgment.<sup>94</sup> Since "Apple did not contest summary judgment under the virtual identity standard on the merits, judgment was properly entered."<sup>95</sup>

## V. THE APPLE COMPUTER TEST

*Apple Computer* provides copyright attorneys with straightforward insight into the Ninth Circuit's thinking process on substantial similarity. The Ninth Circuit set forth the steps it finds helpful in analyzing copyright cases "applying well-settled principles."<sup>96</sup> First, the "plaintiff must identify the source(s) of the alleged similarity between his work and the defendant's work."<sup>97</sup> Second, using analytic dissection, the trial court must determine if any of the alleged similarities are subject to copyright protection.<sup>98</sup> As in the *Apple Computer* case, any elements which are not subject to copyright protection must be identified separately from those aspects that may be subject to copyright laws (e.g., any authorized copying, unprotectable ideas, or indispensable expression).

Third, "[h]aving dissected the alleged similarities and considered the range of possible expression, the court must define the scope of the plaintiff's copyright — that is, decide whether the work is entitled to 'broad' or 'thin' protection."<sup>99</sup> After defining the scope of the copyright in issue, the court can determine "the appropriate standard for a subjective comparison of the works" under the intrinsic test to ascertain if "they are sufficiently similar to support a finding of illicit copying."<sup>100</sup>

## VI. CONCLUSION

While Apple may not have been pleased with the decision, and may be even less pleased with the decision to appeal and the subse-

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93. *Id.*

94. *Id.* at 1439 n.7.

95. *Id.* at 1447.

96. *Apple Computer*, 35 F.3d at 1443.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

quent remand,<sup>101</sup> the decision sends the signal to Silicon Valley and others that the trend toward compatibility may not be stopped by the copyright laws. As hardware, software, and interfaces in general become more compatible, more expression will be deemed unoriginal or indispensable, and there will be less copyrightable expression.

When Apple initially filed this lawsuit against Microsoft and HP, many copyright attorneys thought the stage was set for a definitive ruling on the status of "look and feel" claims similar to those in the heyday of "look and feel" with *Roth Greeting Cards*.<sup>102</sup> The three parties had enough money and motivation to see the lawsuit through to the end, which they did. However, the 1985 Agreement and the revelation of Apple's access to pre-existing Xerox material substantially limited the material Apple could claim was protected by their audiovisual copyrights. As a result, the full context of a "look and feel" claim may not have yet been explored in the Ninth Circuit. However, *Apple Computer* has filled in another piece of the substantial similarity puzzle: If the copyright claim is based on the "look and feel" of the arrangement of unprotected components, the protection afforded the copyright is "thin" and to show infringement the copyright holder must show that the works are "virtually identical" to the reasonable person under the intrinsic test.<sup>103</sup>

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101. The Court of Appeals for the Ninth Circuit remanded the case for a rehearing on whether Microsoft and HP were entitled to attorney's fees as a "prevailing party" under 17 U.S.C. § 505 in light of standard announced in *Fogerty v. Fantasy, Inc.*, 114 S. Ct. 1023, 1033 (1994), during the pendency of the appeal.

102. *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106 (9th Cir. 1970).

103. *Apple Computer*, 35 F.3d at 1447.