
NOTE

The Bratz Trap: Ownership and Infringement at the Nexus of Copyright and Employment Law

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INTRODUCTION

George Jetson is a model inventor in the Sprocket Design Division at Spacely's Space Sprockets.¹ While working for Spacely's founder and owner, Mr. Spacely, George develops a prototype for a new sprocket that could revolutionize the sprocket industry.² George utilizes time during his workday and Spacely's spare sprockets to develop the prototype sprocket.³ George, who has a checkered past with Mr. Spacely, then smuggles his design to Spacely's rival, Mr. Cogswell, owner of Cogswell's Cogs.⁴ Mr. Cogswell, recognizing the potential value of George's new sprocket, agrees to mass-produce George's invention.⁵ George gives Mr. Spacely his two-week employment termination notice but continues to develop a prototype sprocket during his remaining days at Spacely's.⁶ After Cogswell's sprocket becomes an intergalactic success, Mr. Spacely learns that his former employee, George, is the true creator of the wildly successful sprocket.⁷ In response, Mr. Spacely sues George, Mr. Cogswell, and Cogswell's Cogs for copyright infringement under the Copyright Act of 1976, seeking control of the prototype sprocket.⁸

The Ninth Circuit recently encountered a similar situation at the nexus of copyright and employment issues in *Mattel, Inc. v. MGA Entertainment, Inc.*⁹ In *Mattel*, a Mattel employee — Carter Bryant — invented the Bratz doll line during work hours using Mattel's materials, but subsequently joined MGA, bringing the Bratz doll line with him.¹⁰ Mattel sued Bryant and MGA for copyright infringement in producing the line of Bratz dolls. The court determined that Mattel did

¹ This scenario is loosely derived from *The Jetsons* cartoon produced by Hanna Barbara Productions. See *The Jetsons: The Little Man* (ABC television broadcast Jan. 13, 1963).

² See *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 907 (9th Cir. 2010); discussion *supra* note 1.

³ See *Mattel*, 616 F.3d at 907; discussion *supra* note 1.

⁴ See *Mattel*, 616 F.3d at 907; discussion *supra* note 1; *cf.* *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1437-39 (9th Cir. 1994) (analyzing whether competitor illegally violated copyright protection of borrowed computer software).

⁵ See *Mattel*, 616 F.3d at 907; discussion *supra* note 1.

⁶ See *Mattel*, 616 F.3d at 907; discussion *supra* note 1.

⁷ See *Mattel*, 616 F.3d at 907; discussion *supra* note 1; *cf.* *Cubic Corp. v. Marty*, 229 Cal. Rptr. 828, 834 (Ct. App. 1986) (finding that former employee violated copyright protection assigned to employer under work for hire doctrine after employee left company for competitor).

⁸ See 17 U.S.C. §§ 101-102 (2006).

⁹ *Mattel*, 616 F.3d at 904.

¹⁰ See *id.* at 907-08.

not own the Bratz dolls, but noted that the employer owns work produced by employees.¹¹ Nevertheless, the court ultimately held that this default ownership excludes work produced outside the employer-employee relationship, as well as mere ideas.¹²

Determining ownership of employee inventions presents significant challenges in United States copyright law when copyright and employment issues merge under a corporate setting.¹³ Courts continue to struggle with assigning ownership of work product developed within the sphere of the employer-employee relationship.¹⁴ The resulting disconnect illustrates the difficulty in determining who is an

¹¹ See *id.* at 912-13; cf. Michael D. Birnhack, *Who Owns Bratz? The Integration of Copyright and Employment Law*, 20 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 95 (2009) (identifying statutory criteria that must be satisfied or else initial ownership is to employer rather than employee); Nancy S. Kim, *Martha Graham, Professor Miller and the "Work for Hire" Doctrine: Undoing the Judicial Bind Created by the Legislature*, 13 *J. INTELL. PROP. L.* 337, 342-43 (2006) (indicating that work for hire doctrine reverses general presumption that creator is author of work and, therefore, owner of copyright); Jisuk Woo, *Genius With Minimal Originality? The Continuity and Transformation of the "Authorship" Construct in Copyright Case Law Regarding Computer Software*, 15 *ALB. L.J. SCI. & TECH.* 109, 110 (2004) (showing copyright is conferred on creators by Constitution and various statutes for public ends, such as to promote progress of science and useful arts).

¹² See *Mattel*, 616 F.3d at 913; see, e.g., *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 740 (9th Cir. 1971) (noting that unlike patents, copyrights give protection only to expression of idea and not idea itself); Kim, *supra* note 11, at 344 (indicating that if creator is not employee, default rule regarding ownership favors creator or independent contractor); cf. James B. Wadley & Jolynn M. Brown, *Protecting Intellectual Property Rights in the Workplace*, 68 *J. KAN. B. ASS'N* 28, 28 (1999) (arguing that works may have value to employment and thus claimed by employer or may have bearing on career opportunities and thus claimed by employees).

¹³ See Birnhack, *supra* note 11, at 99 (noting that nexus of employment and copyright law reflects conflict between efficacy and fairness); cf. Glynn S. Lunney, Jr., *Lotus v. Borland: Copyright and Computer Programs*, 70 *TUL. L. REV.* 2397, 2397 (1996) [hereinafter *Copyright and Computer Programs*] (indicating that task of deciding whether admitted copying of some element from copyright program constitutes infringement is sometimes difficult); Woo, *supra* note 11, at 121 (asserting that courts create inconsistencies by shifting focus of arguments between notions of authorship and work).

¹⁴ See, e.g., Kim, *supra* note 11, at 342, 347 (indicating that Copyright Act of 1976 does not define important terms such as author, employee, and employer); David Loretto, Note, *Employee Patents on Computer-Implemented Inventions: The Conundrum of Separate Ownership of Patent and Copyright*, 23 *CARDOZO L. REV.* 705, 725 (2002) (noting that circuit courts are divided over proper standard for determining whether copyrighted work was made for hire); cf. *id.* at 725 (explaining that work for hire provisions were introduced to provide predictability, but Copyright Act failed to offer definitions for either employee or scope of employment).

author, who should control copyrights, and what constitutes infringement of a copyright.¹⁵

Determining ownership of inventions strains both employment and copyright law through evolving conceptions of authorship and ownership.¹⁶ System-based invention of the twenty-first century within corporations has effectively replaced the Romantic author-genius of the eighteenth century.¹⁷ Like the shift in authorship conceptions, the relationship between employers and employees similarly evolved.¹⁸ This evolution resulted in confusing and outdated models for understanding ownership in modern employment settings.¹⁹ Many

¹⁵ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344-45 (1991) (defining original definition of author as one to whom something owes its creation); Birnhack, *supra* note 11, at 103 (arguing that current law contains hidden assumptions about creative process, cultural markets, workplaces, and relationship between employers and employees); Wadley & Brown, *supra* note 12, at 32 (indicating that Copyright Act vests ownership of copyright and specific copyright rights embodied therein to original author of work).

¹⁶ See Birnhack, *supra* note 11, at 99; Kim, *supra* note 11, at 340 (indicating that ownership in copyright law is all or nothing concept — either employer or employee owns entire work and other is left with nothing); Steven Cherenky, Note, *A Penny For Their Thoughts: Employee-Inventors, Preinvention Assignment Agreements, Property, and Personhood*, 81 CAL. L. REV. 597, 605-06 (1993) (identifying shift from individual inventor to team and invention resulting from coordinated efforts of team); cf. Steven M. Cordero, Note, *Cocaine-Cola, The Velvet Elvis, and Anti-Barbie: Defending the Trademark and Publicity Rights to Cultural Icons*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 599, 609 (1998) (arguing that principle of intellectual property law is to grant creators of information limited monopoly in form of patents, copyrights, and trademarks).

¹⁷ See, e.g., Birnhack, *supra* note 11, at 104 (contrasting Romantic authorship with twentieth century works of authorship created within corporate, system-based hierarchical settings); Woo, *supra* note 11, at 112 (defining Romantic version of author as individual introducing new expressions into world); Cherenky, Note, *supra* note 16, at 610 (asserting that companies strive to rationalize invention process through design laboratories because innovation is risky and expensive).

¹⁸ See Kim, *supra* note 11, at 341 (arguing that courts have increasingly focused on issue of existence of employment relationship rather than whether creation occurred within scope of employment); Cherenky, Note, *supra* note 16, at 611 (identifying professionalizing trend of invention and that inventor is more likely to work in groups than as individual); cf. Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 485 (1996) [hereinafter *Reexamining*] (indicating that courts define appropriate scope of copyright by examining incentives and access).

¹⁹ Cf. Birnhack, *supra* note 11, 106 (noting that globalization changed modes of production); Lunney, Jr., *Reexamining*, *supra* note 18, at 487 (assuming that courts find incentives more desirable in absence of some unusual need for access); Sarah Brashears-Macatee, Note, *Total Concept and Feel or Dissection? Approaches to the Misappropriation Test of Substantial Similarity*, 68 CHI.-KENT L. REV. 913, 936 (1993) (arguing that substantial similarity test is creature of confusion).

ownership questions remain unanswered and unanswerable under modern copyright law.²⁰ For example, when should courts grant authorship to the hard-working individual or to the risk-taking employer?²¹ Similarly, when should courts emphasize employer rights to the detriment of individual creativity?²² These questions arise in the fact-based analysis that courts perform to determine copyright ownership and infringement issues in disputes between employers and employees.²³

This Note argues that the Ninth Circuit erred in *Mattel* by holding that the artist/employee owned and enjoyed copyright protection of the Bratz doll line.²⁴ Part I examines the background of the Copyright

²⁰ See Wadley & Brown, *supra* note 12, at 29 (noting that determining who owns control of property is difficult unless parties have expressly structured formal relationship); Steven Wilf, *The Making of the Post-War Paradigm in American Intellectual Property Law*, 31 COLUM. J.L. & ARTS 139, 175 (2008) (highlighting important role that Congress traditionally plays in determining outcomes in intellectual property policy debates); cf. Kim, *supra* note 11, at 373 (noting that all or nothing nature of work for hire doctrine creates difficulties for judiciary where employee is creative genius or academic).

²¹ Cf. Susan Sell, *Intellectual Property and Public Policy in Historical Perspective: Contestation and Settlement*, 38 LOY. L.A. L. REV. 267, 267 (2004) (identifying shifting conceptions of ownership, authorship, and invention as foundation for intellectual property law); Wadley & Brown, *supra* note 12, at 32 (arguing that copyright laws are most difficult to apply in work place where virtually every original work is ultimately fixed in tangible expressions); Wilf, *supra* note 20, at 205 (arguing that courts and legislatures have difficulty in accommodating emerging technologies such as peer-to-peer internet music sharing under copyright law).

²² Cf. Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800-1920*, 52 HASTINGS L.J. 441 (2001) [hereinafter *Working Knowledge*] (questioning existence of any legitimate interest employers have in maintaining monopolistic control over knowledge created by employees); Wadley & Brown, *supra* note 12, at 32 (arguing that presumptive rule in workplace for protection is unfair to employee or unworkable in realities of workplace). See generally Kim, *supra* note 11 (discussing particularly troubling application of equity by courts in creating negative precedent for employee ownership rights).

²³ See Birnhack, *supra* note 11, at 103 (explaining that dichotomous relationship between employee and employer produces dichotomous result of singular ownership); Kim, *supra* note 11, at 348 (indicating that no one factor is determinative in defining employer-employee relationship; instead, courts must consider many factors); Loretto, *supra* note 14, at 725 (noting that courts may take some of eleven factors from Restatement (Second) of Agency (1958) into account when determining scope of employment).

²⁴ Cf. Kim, *supra* note 11, at 343 (noting that in work for hire cases, employer is considered author and owns copyright unless parties have otherwise agreed in writing); Jessica Litman, *Breakfast With Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1728 (1999) (indicating that essence of any intellectual

Act and orients *Mattel* within relevant case law.²⁵ Part II illustrates the fundamental issues extant where copyright and employment law meet in *Mattel*.²⁶ Part III argues that the Ninth Circuit incorrectly denied *Mattel*'s ownership of Bratz by failing to find broad copyright infringement by MGA.²⁷ First, *Mattel* erred by misconstruing the express employment contract between Bryant and *Mattel*, as well as misapplying the work for hire doctrine.²⁸ Second, *Mattel* erred by extending thin rather than broad copyright protection to the Bratz doll line.²⁹ Finally, *Mattel* failed to consider the significant public policy repercussions of reinforcing individual authorship rights at the expense of risk-taking employers.³⁰

I. BACKGROUND

The Copyright Act of 1976 ("Copyright Act") provides the statutory framework under which courts decipher inherently difficult cases involving copyright infringement claims in employer-employee relationships.³¹ Further, case law developed several doctrines interpreting the Copyright Act and provides tests to apply in various situations.³² Although the clarity of these tests remains disputed, these

property regime is dividing valuable work subject to private appropriation from valuable work that is reserved for public use); Cordero, *supra* note 16, at 609 (arguing that copyright protection encourages and rewards creative expression and innovation).

²⁵ See *infra* Part I (providing background on applicable copyright law and doctrines).

²⁶ See *infra* Part II (providing *Mattel*'s background and relevant facts).

²⁷ See *infra* Part III (analyzing applicable copyright law and doctrine to determine that Ninth Circuit erred in finding thin copyright protection and no ownership).

²⁸ See *infra* Part III.A (analyzing employment contract and work for hire doctrine to find that ownership should be assigned to *Mattel*).

²⁹ See *infra* Part III.B (analyzing extrinsic/intrinsic test to determine that broad copyright protection extends to *Mattel*'s ownership of Bratz).

³⁰ See *infra* Part III.C (analyzing broad policy consequences for modern innovation by limiting corporate ownership of employee works).

³¹ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991); see, e.g., *Kim*, *supra* note 11, at 339-40 (indicating that 17 U.S.C. §§ 101, 201(b) (2006) provide default ownership in favor of employer rather than employee). *But see Kim*, *supra* note 11, at 343 (illustrating that Copyright Act fails to define terms such as "employer" or "employee").

³² See, e.g., *Satava v. Lowry*, 323 F.3d 805 (9th Cir. 2003) (illustrating how extrinsic/intrinsic test functions in providing broad versus thin copyright protection to works of art); *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435 (9th Cir. 1994) (using extrinsic/intrinsic test of copyright law to determine protection afforded to emerging technology); *Aliotti v. R. Dakin & Co.*, 831 F.2d 898 (9th Cir. 1987) (using extrinsic/extrinsic test to determine that plush dinosaur toys only enjoyed thin

doctrines provide basic interpretation techniques for determining copyright protection and infringement.³³

A. *The Copyright Act: Broad Versus Thin Copyright Protection*

The Copyright Act provides the statutory framework for determining the scope and nature of copyright protection.³⁴ Works under the Copyright Act arise when an original work is fixed in physical medium for the first time.³⁵ Similarly, “copies of works” are material objects in which a work is fixed in a permanent and tangible medium of expression.³⁶ A copyright owner enjoys exclusive rights to both original works and their copies.³⁷ However, a copyright owner may transfer exclusivity rights by assignment or any other legal conveyance.³⁸ Thus, a copyright owner maintains the exclusive right to distribute copies of the copyrighted work to the public.³⁹

Currently, copyrightable works are limited to original works of authorship including literary, pictorial, graphic, sculptural, and audiovisual works.⁴⁰ Thus, books, musical compositions, and motion

protection).

³³ See *Satava*, 323 F.3d at 806; *Apple Computer*, 35 F.3d at 1443-44; cf. *Birnhack*, *supra* note 11, at 112 (demonstrating that there must be causal connection between art and employment).

³⁴ See *Kim*, *supra* note 11, at 339-40; cf. 17 U.S.C. § 101 (2006) (defining terms in Copyright Act of 1976); *Birnhack*, *supra* note 11, at 126 (arguing copyright purpose is incentive to would-be author because it prevents unlicensed uses of copyrighted work by others).

³⁵ See 17 U.S.C. § 101; see, e.g., *JCW Invs., Inc. v. Novelty, Inc.*, 482 F.3d 910, 914 (7th Cir. 2007) (holding that works exist moment idea is transformed into expression); *Loretto*, *supra* note 14, at 724 (indicating that copyright exists at moment original work is fixed in any tangible medium of expression).

³⁶ See 17 U.S.C. § 101; *JCW Invs.*, 482 F.3d at 914; cf. *Kim*, *supra* note 11, at 344 (indicating that only owner may create or authorize derivative works).

³⁷ See 17 U.S.C. § 101; see e.g., *Cordero*, *supra* note 16, at 609 (arguing that purpose of copyright law is to provide monopoly in favor of creator); cf. *Loretto*, *supra* note 14, at 714 (noting that copyright principle of granting exclusive rights to authors promotes progress of science and useful arts in order to benefit society as whole).

³⁸ See 17 U.S.C. §§ 101, 201(d); cf. *Birnhack*, *supra* note 11, at 112 (indicating that employees maintain absolute ownership of works created outside of scope of work). *But see Kim*, *supra* note 11, at 345 (noting that parties cannot agree that work is made for hire to avoid termination provisions of Copyright Act if employment relationship does not actually exist).

³⁹ See 17 U.S.C. § 106; *Kim*, *supra* note 11, at 345; *Loretto*, *supra* note 14, at 714.

⁴⁰ See 17 U.S.C. § 102; see also *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 356 (1991) (holding that 17 U.S.C. § 102(b) does not apply); cf. *Wilf*, *supra* note 20, at 145 (arguing that copyright strengthened in response to needed protection for America's cultural industries such as cinema).

pictures may enjoy copyright protection.⁴¹ Telephone numbers and geometry, however, are not copyrightable because they are common facts rather than original expressions of ideas.⁴² Likewise, copyright protection does not extend to mere ideas, regardless of their presentation in a work.⁴³ While the Copyright Act provides the framework for copyright ownership and infringement, courts continue to adopt various copyright doctrines interpreting the elusive law.⁴⁴

B. Relevant Copyright Doctrines

The Ninth Circuit's unique multifactor analysis of copyright protection in *Mattel* requires courts to analyze the unique facts of each case.⁴⁵ First, the court uses the extrinsic/intrinsic test to determine if a work is wholly or partially an expression of an idea.⁴⁶ Next, the court

⁴¹ See 17 U.S.C. § 101; see, e.g., Wilf, *supra* note 20, at 174-75 (identifying restriction of applying copyright protection to themes, ideas, books, and plays that are common and from which every author may draw material). *But see* Lunney, Jr., *Reexamining*, *supra* note 18, at 523 (noting works that inform, clothe, transport, shelter, or accomplish something usually require direct duplication for finding of copyright infringement).

⁴² See *Feist Publ'ns*, 499 U.S. at 340, 349; *Baker v. Selden*, 101 U.S. 99, 100-01 (1880); Lunney, Jr., *Copyright and Computer Programs*, *supra* note 13, at 2398.

⁴³ See 17 U.S.C. § 102; see, e.g., *Feist Publ'ns*, 499 U.S. at 349 (holding that protection afforded to ideas also extends to objective facts); *Satava v. Lowry*, 323 F.3d 805, 807-08 (9th Cir. 2003) (finding strong public policy for permitting free use of ideas contained in copyrightable work, so long as protected expression itself is not appropriated).

⁴⁴ See, e.g., *Satava*, 323 F.3d at 805 (applying substantial similarity test to determine copyright infringement); *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435 (9th Cir. 1994) (looking at extrinsic and intrinsic nature of works to determine if work violates another's copyright); *Aliotti v. R. Dakin & Co.*, 831 F.2d 898 (9th Cir. 1987) (finding that broad protection is inappropriate where extrinsic/intrinsic test determines scope of copyright protection is narrow).

⁴⁵ *Cf. Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977) (requiring examination in each case of circumstantial evidence of access to copyrighted work and substantial similarity between works); *Litman*, *supra* note 24, at 1729 (arguing that intellectual property protection requires showing that if protection is not extended, unforeseen negative consequences will result); Lunney, Jr., *Reexamining*, *supra* note 18, at 499 (noting that copyright owner will succeed in preventing another from copying work if owner can demonstrate ownership and copying by infringer).

⁴⁶ See, e.g., *Apple Computer*, 35 F.3d at 1435 (applying extrinsic/intrinsic test to determine if copyright infringement exists); *Sid & Marty Krofft Television Prods.*, 562 F.2d at 1164 (holding that extrinsic test depends on specific criteria that can be listed and analyzed, while intrinsic test looks at similarities of ideas); *cf. Brashears-Macatee*, *supra* note 19, at 914 (indicating that substantial similarity is at heart of most infringement cases, but is still nearly impossible to define).

must determine if the work is a broad expression of an idea, afforded broad protection, or a narrow expression, afforded thin protection.⁴⁷ Finally, if the court affords broad copyright protection, the court must then determine if the copied work is substantially similar to the original work for a finding of copyright infringement.⁴⁸ However, if the court affords thin copyright protection, the court must determine if the copied work is virtually identical to the original work for a finding of copyright infringement.⁴⁹

Copyright law protects only expressions of ideas, and courts have consistently held that copyright protection does not extend to mere ideas and facts.⁵⁰ For example, in *Baker v. Selden*, the Supreme Court ruled that Selden's accounting book was not entitled to copyright protection from substantial infringement.⁵¹ Selden could not protect the art of accounting itself because such protection would close

⁴⁷ See, e.g., *Satava*, 323 F.3d at 811 (finding invalid that any combination of nonprotectable ideas automatically qualifies for copyright protection; rather, it must be original work of authorship); Lunney, Jr., *Reexamining*, *supra* note 18, at 527 (indicating that where there are more ways to express ideas, broad protection applies, whereas if there are few ways to express ideas, exact duplication applies); cf. *Sid & Marty Krofft Television Prods.*, 562 F.2d at 1168 (holding that scope of copyright protection increases with extent material expression differs from idea expressed).

⁴⁸ See *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 913-14 (9th Cir. 2010); *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir. 1985); Tony Dutra, *Mattel's Ownership Rights in Bratz Doll Copyright, Trademark Overturned on Appeal*, 80 PAT. TRADEMARK & COPYRIGHT J. 419, 419 (2010) (indicating that broad determination requires ordinary reasonable observer to consider alleged infringing work substantially similar).

⁴⁹ See *Apple Computer*, 35 F.3d at 1439 (holding that when range of protectable and unauthorized expression is narrow, appropriate standard for determining infringement is virtually identical); Lunney, Jr., *Reexamining*, *supra* note 18, at 527. *But see* Brashears-Macatee, Note, *supra* note 19, at 923 (demonstrating inconsistency in courts' approaches when determining substantial similarity).

⁵⁰ See 17 U.S.C. § 102(b) (2006); *Baker v. Selden*, 101 U.S. 99, 99-106 (1880); see, e.g., *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348-49 (1991) (identifying facts and ideas as unavailable for copyright protection because originality is *sine qua non* of copyright law); *JCW Invs., Inc. v. Novelty, Inc.*, 482 F.3d 910 (7th Cir. 2007) (finding thin protection extended to doll violated by copying); cf. Joseph Scott Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451, 458 (2009) (stating that copyright laws appear designed to protect as much expressive material as possible no matter how trivial); *id.* at 458-59 (noting that copyright attaches at moment original expression is fixed in any tangible medium of expression without any need to first comply with any formality).

⁵¹ See *Baker*, 101 U.S. at 100-02; see, e.g., Lunney, Jr., *Copyright and Computer Programs*, *supra* note 13, at 2398 (indicating that patents, not copyrights, should protect useful things); Loretto, *supra* note 14, at 739 (noting that Supreme Court rejected extending copyright protection to those works preventing public access to particular methods of doing business).

accounting to everyone without Seldon's express permission.⁵² Unlike Seldon's accounting book, which merely espoused general accounting ideas, objects with physical form as their essence may receive copyright protection.⁵³

More recently, the Ninth Circuit clarified the availability of copyright protection as extending only to expressions of ideas and not to ideas themselves.⁵⁴ In *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, the court found that the defendant's jeweled bee pin did not violate the plaintiff's copyrighted jeweled bee pin.⁵⁵ Although both pins appeared similar to real bees, the court noted that copyright protection does not extend to lifelike images of bees.⁵⁶ Copyright bars only particular expressions of an idea but not all uses of the idea itself.⁵⁷ Because the idea of a bee and the expression of a bee are inseparable, the plaintiff could not expect copyright protection.⁵⁸ By not extending copyright protection to expressions that merge with ideas, the court extended its interpretation of copyright law as protecting and promoting competition.⁵⁹

⁵² See *Baker*, 101 U.S. at 103-04; Lunney, Jr., *Copyright and Computer Programs*, *supra* note 13, at 2398; Loretto, *supra* note 14, at 739.

⁵³ See *Baker*, 101 U.S. at 103-04; Kim, *supra* note 11, at 342; Loretto, *supra* note 14, at 724.

⁵⁴ See e.g., *Satava v. Lowry*, 323 F.3d 805 (9th Cir. 2003) (finding idea of jellyfish in particular medium nonprotectable); *Apple Computer*, 35 F.3d at 1441 (finding no infringement where expression of ideas limited by medium of portrayal); *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971) (finding that idea of animal as it exists in nature is nonprotectable).

⁵⁵ *Herbert Rosenthal Jewelry Corp.*, 446 F.2d at 739.

⁵⁶ See *id.* at 741.

⁵⁷ See *id.*; cf. Miller, *supra* note 50, at 480 (noting that requisite level of creativity is extremely low — even slight amount will suffice); Woo, *supra* note 11, at 114 (arguing that courts clearly considered originality to be minimal requirement).

⁵⁸ See *Herbert Rosenthal Jewelry Corp.*, 446 F.2d at 742 (finding that such protection grant would confer monopoly over all expressions of bees); cf. Lunney, Jr., *Copyright and Computer Programs*, *supra* note 13, at 2407-08 (indicating that expansive copyright protection imposes extensive constraints on others to copy, thus increasing costs for competitors); Lunney, Jr., *Reexamining*, *supra* note 18, at 508-09 (arguing that threat to future creation of works requires limiting protection afforded by copyright).

⁵⁹ See *Herbert Rosenthal Jewelry Corp.*, 446 F.2d at 742; see, e.g., *Satava*, 323 F.3d at 807 (finding that copyright protection granted artists exclusive right to original expression in their works but denied exclusive right to ideas and standard elements); Wadley & Brown, *supra* note 12, at 29 (indicating that courts balance public's need to access information with monopolistic incentives to creators).

Courts resolve the difficulty in determining when an idea becomes an expression of an idea through a bifurcated extrinsic/intrinsic test.⁶⁰ The extrinsic test examines similarities between the copyrighted and challenged works and determines whether the similar elements are protectable or nonprotectable.⁶¹ In applying the extrinsic test, the court looks for similarity of ideas based on external factors, such as analytic dissection and expert testimony.⁶² The court also considers works objectively as to whether there are substantial similarities.⁶³

Conversely, the intrinsic test determines whether an ordinary reasonable observer would consider the copyrighted and challenged works substantially similar or virtually identical.⁶⁴ By looking at the reaction of an ordinary reasonable observer, the intrinsic test focuses on subjective aspects of expression.⁶⁵ Courts further refined the concept of the ordinary reasonable observer to include the targeted consumer or the potential consumer.⁶⁶ Thus, courts utilize both the objective extrinsic test and the subjective intrinsic test to determine if a work is copyrightable.⁶⁷

⁶⁰ See *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir. 1985); Lunney, Jr., *Copyright and Computer Programs*, *supra* note 13, at 2403 (indicating that use of explicit/intrinsic to determine protectable and nonprotectable ideas extends back to Judge Learned Hand); *cf. id.* at 2401-02 (noting that copyright only protects aspects that court identifies as expression, leaving elements that express common ideas unprotected).

⁶¹ See *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 913 (9th Cir. 2010); *Data E. USA, Inc. v. EPYX, Inc.*, 862 F.2d 204, 207 (9th Cir. 1988); *Berkic*, 761 F.2d at 1292.

⁶² See *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442 (9th Cir. 1994); *Berkic*, 761 F.2d at 1292; *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977).

⁶³ See *JCW Invs., Inc. v. Novelty, Inc.*, 482 F.3d 910, 916 (7th Cir. 2007); *Apple Computer*, 35 F.3d at 1442 (comparing works after excluding nonprotectable ideas to determine scope of protection); *Data E. USA*, 862 F.2d at 207.

⁶⁴ See *Mattel*, 616 F.3d at 913-14; *Sid & Marty Krofft Television Prods.*, 562 F.2d at 1164; *cf. Brashears-Macatee*, *supra* note 19, at 917 (noting that intrinsic test is factual matter for jury and should be determined by ordinary observers' impression of entire work).

⁶⁵ See *Apple Computer*, 35 F.3d at 1442-43; *Sid & Marty Krofft Television Prods.*, 562 F.2d at 1164; *cf. Lunney, Jr., Reexamining*, *supra* note 18, at 544-45 (arguing that intrinsic test looks for aspects in later work taken from former rather than asking whether audience would consider later work duplicate).

⁶⁶ See, e.g., *Data E. USA*, 862 F.2d at 209-10 (using prospective target audience subject of video game to subjectively judge substantial similarity); *Sid & Marty Krofft Television Prods.*, 562 F.2d at 1164 (looking at observations and impressions of average reasonable reader and spectator of television program); *cf. Brashears-Macatee*, *supra* note 19, at 925 (arguing that dissecting dissimilarities distracts ordinary observer from total concept and feel of work).

⁶⁷ *Cf. Berkic*, 761 F.2d at 1293 (finding that plaintiff must show similarity of both

The Ninth Circuit further refined the extrinsic/intrinsic test in determining copyright infringement in *Apple Computer, Inc. v. Microsoft Corp.*⁶⁸ In *Apple Computer*, the court found that Microsoft's graphical user interface ("GUI") did not infringe Apple's copyright, despite its substantial similarity to Apple's GUI.⁶⁹ After removing nonprotectable elements under the extrinsic test, the court found the remaining GUI expressions indispensable elements necessary for the computer interface idea.⁷⁰ Under the intrinsic test, the court compared the works in their entirety to determine subjective similarity in expression of the GUI idea.⁷¹ After analyzing both stages of the extrinsic/intrinsic test, the court determined that thin protection was the appropriate scope of copyright protection.⁷² Here, the works failed to meet the virtually identical standard necessary under thin protection, and, therefore, the court found no copyright infringement by Microsoft.⁷³ Thus, as *Apple Computer* demonstrates, the outcome of the bifurcated extrinsic/intrinsic test determines the scope of judicial copyright protection.⁷⁴

Courts determine broad or thin copyright protection by analyzing the breadth of possible expressions of the work's protectable elements.⁷⁵ Where there is a wide range of possible expression,

idea and expression); *Sid & Marty Krofft Television Prods.*, 562 F.2d at 1167 (holding that copyright cannot be limited to literal copying or else plagiarist could make infringing works with only immaterial variations); Lunney, Jr., *Reexamining*, *supra* note 18, at 526 (arguing that once protectable elements are separated from ideas, plaintiffs must demonstrate that allegedly infringing works are too similar to expression of entire work).

⁶⁸ See *Apple Computer*, 35 F.3d at 1442.

⁶⁹ See *id.* at 1438-39 (noting that Microsoft's license of Apple's GUI went beyond licensed use by directly copying Apple's interface).

⁷⁰ See *id.* at 1444-45.

⁷¹ See *id.* at 1442.

⁷² See *id.* at 1443; see, e.g., *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 914 (9th Cir. 2010) (holding thin protection appropriate when range of expression is narrow); *Frybarger v. Int'l Bus. Machs. Corp.*, 812 F.2d 525, 530 (9th Cir. 1987) (finding that narrow range of expressions available in videogame medium necessitates virtually identical copying for infringement).

⁷³ See *Apple Computer*, 35 F.3d at 1444 (extending thin protection of virtually identical analysis when idea merges with expression).

⁷⁴ See *Data E. USA, Inc. v. EPYX, Inc.*, 862 F.2d 204, 208 (9th Cir. 1988); *Frybarger*, 812 F.2d at 530; *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977).

⁷⁵ See *Mattel*, 616 F.3d at 914; *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir. 1985); cf. Lunney, Jr., *Copyright and Computer Programs*, *supra* note 13, at 2431 (arguing that copying constitutes infringement when, given nature of copied work, copier receives unfair advantage).

copyright protection is similarly broad.⁷⁶ However, where there is only a narrow range of possible expression, copyright protection is thin.⁷⁷

The Ninth Circuit balances broad and thin protection to determine the amount of copyright protection afforded to various types of works.⁷⁸ For example, in *Satava v. Lowry*, the court found that glass-in-glass jellyfish sculptures enjoyed only thin protection against copyright infringement.⁷⁹ Although Lowry directly copied Satava's idea for glass-in-glass sculptures of jellyfish, the jellyfish idea itself received no copyright protection.⁸⁰ Given the narrow range of expression for typical jellyfish physiology and the glass-in-glass medium, the court afforded Satava's sculptures extremely narrow protection.⁸¹ Thus, a finding of broad or thin protection then determines whether the court should utilize either the substantially similar or the virtually identical test.⁸²

The court utilizes the substantially similar test when the work receives broad copyright protection.⁸³ Under this test, a work need only be substantially similar to another to find copyright infringement.⁸⁴ For example, there are many ways to create an aliens-

⁷⁶ See *Mattel*, 616 F.3d at 913-14; *Data E. USA*, 862 F.2d at 208; *Berkic*, 761 F.2d at 1292.

⁷⁷ See *Mattel*, 616 F.3d at 914; *Apple Computer*, 35 F.3d at 1443; *Frybarger*, 812 F.2d at 530.

⁷⁸ See, e.g., *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068 (9th Cir. 2000) (extending broad protection to commercial photographs); *Apple Computer*, 35 F.3d at 1443 (using thin protection where medium of computer limits range of expression); *Frybarger*, 812 F.2d 525 (determining whether broad or thin protection applies based on restrictions of medium).

⁷⁹ See *Satava v. Lowry*, 323 F.3d 805, 807 (9th Cir. 2003); *Bryant v. Mattel, Inc.*, No. CV 04-09049, 2008 U.S. Dist. LEXIS 63391, at *6-7 (C.D. Cal. July 24, 2008).

⁸⁰ See *Satava*, 323 F.3d at 810 (finding lifelike representation of jellyfish did not present any originality beyond idea of jellyfish; therefore, sculptures consisted almost entirely of nonprotectable ideas); cf. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (noting that original authorship does not automatically prove broad copyright protection because ideas may still be copied).

⁸¹ See *Satava*, 323 F.3d at 812 (finding thin protection for unique arrangement of jellyfish physiology as other ideas expressed in statutes failed to contribute any originality to public domain); *Apple Computer*, 35 F.3d at 1443; *Frybarger*, 812 F.2d at 530.

⁸² See sources cited *supra* note 75; cf. Lunney, Jr., *Reexamining, supra* note 18, at 530 (indicating that more forms of expression and more extensive copyright protection can exist without threatening public's need for access).

⁸³ See *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 914-15 (9th Cir. 2010); *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir. 1985); cf. Jeffrey R. Babbitt et al., *Developments in the Second Circuit: 2003-2004*, 37 CONN. L. REV. 963, 1071 (2005) (noting that works need not be novel or unusual to receive protection; works must simply meet minimal threshold of creativity for broad or thin protection).

⁸⁴ See *Mattel*, 616 F.3d at 914; *id.* at 916-17 (holding that expression of ideas must

attack movie; therefore, the work receives broad protection and need only be substantially similar for infringement.⁸⁵ However, where there is only a narrow range of expression, such as male detectives investigating an organ-snatching operation, broad protection is inappropriate.⁸⁶

Conversely, courts use the virtually identical test when the work receives only thin protection.⁸⁷ Under this test, a work must be virtually identical to another work to find copyright infringement.⁸⁸ Courts also utilize the virtually identical test where there is a merging of ideas and expression of ideas.⁸⁹ For example, in *Aliotti v. R. Dakin & Co.*, the Ninth Circuit used virtually identical analysis to determine possible infringement of similar looking dinosaur toys.⁹⁰ Because Aliotti's toys expressed little more than a common dinosaur idea, the court afforded these works only thin protection.⁹¹ Accordingly, Dakin was free to copy the idea of plush and gentle dinosaur toys based on traditional dinosaur expressions because no original expressions existed.⁹² Thus, after filtering out nonprotectable ideas under the extrinsic/intrinsic test, Aliotti's works warranted only thin protection.⁹³ Without proof of direct copying of protectable expressions, the court applied the virtually identical test to find no copy infringement.⁹⁴ However, as discussed below, copyright

be similar, not ideas themselves); *cf.* Lunney, Jr., *Reexamining*, *supra* note 18, at 520 (arguing that need for access to works, thus avoiding undue monopolization, varies depending on type of work and level of abstraction).

⁸⁵ See *Mattel*, 616 F.3d at 913-14; *Apple Computer*, 35 F.3d at 1446-47; *Berkic*, 761 F.2d at 1292.

⁸⁶ See *Mattel*, 616 F.3d at 914; *Satava*, 323 F.3d at 812; *Berkic*, 761 F.2d at 1292.

⁸⁷ See *Satava*, 323 F.3d at 812; *Apple Computer*, 35 F.3d at 1443, *Frybarger v. Int'l Bus. Machs. Corp.*, 812 F.2d 525, 530 (9th Cir. 1987).

⁸⁸ See *Mattel*, 616 F.3d at 914; *Apple Computer*, 35 F.3d at 1443; *Data E. USA, Inc. v. EPYX, Inc.*, 862 F.2d 204, 208 (9th Cir. 1988).

⁸⁹ See *Data E. USA, Inc.*, 862 F.2d at 208 (finding that no similarity of expression can be found when idea and expression are inseparable); *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 900 (9th Cir. 1987); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1167 (9th Cir. 1977) (holding that use of basic idea of works does not result in similarities sufficient for copyright infringement).

⁹⁰ See *Aliotti*, 831 F.2d at 901 (holding that despite substantially similar ideas, defendant's toys did not infringe because ideas themselves could not be protected).

⁹¹ See *id.* (finding that author's plush toys modeled after traditional dinosaur did not extend beyond common idea of dinosaurs).

⁹² See *id.* at 902 n.2.

⁹³ See *id.* at 901-02.

⁹⁴ See *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1444 (9th Cir. 1994); *Aliotti*, 831 F.2d at 902; *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir. 1985).

framework differs in the employer-employee relationship where the work for hire doctrine may automatically shift authorship to the employer.⁹⁵

C. The Work for Hire Doctrine

The work for hire doctrine determines copyright ownership in employer-employee settings.⁹⁶ The Copyright Act automatically assigns authorship to employers rather than employee inventors in specific two situations.⁹⁷ First, courts deem the employer the author of works where an employee prepares a work within the scope of employment.⁹⁸ Second, the employer is the author of works that the employer specifically orders or commissions from an employee or contractor.⁹⁹ Thus, under the work for hire doctrine, the employer is the original owner unless expressly contracted otherwise.¹⁰⁰ Furthermore, the Copyright Act's legislative history shows congressional intent to strengthen presumptions of employer ownership by expressly avoiding patent law's strong employee protections.¹⁰¹

⁹⁵ See Wadley & Brown, *supra* note 12, at 33 (indicating that work for hire doctrine expands concept of authorship to include employers under appropriate circumstances); *infra* Part I.C (analyzing work for hire doctrine and applicability to employee/employer copyright ownership conflicts).

⁹⁶ See, e.g., CAL. LAB. CODE § 2870 (Deering 2009) (codifying work for hire doctrine); *cf.* Birnhack, *supra* note 11, at 107 (assigning employer ownership if work was created by employee and made within scope of employment); Kim, *supra* note 11, at 342 (noting that Copyright Act shifts presumption of ownership to employer in employer-employee relationships).

⁹⁷ See Wadley & Brown, *supra* note 12, at 34 (indicating that work for hire doctrine is narrowly applied to employees and independent contractors in certain situations); Loretto, *supra* note 14, at 716; *cf.* Kim, *supra* note 11, at 344 (noting that copyright statutes favor ownership by hiring party).

⁹⁸ See 17 U.S.C. §§ 101, 201(b) (2006); Wadley & Brown, *supra* note 12, at 35-36; Cherenksy, *supra* note 16, at 656.

⁹⁹ See 17 U.S.C. §§ 101, 201(b); Birnhack, *supra* note 11, at 107. *But see id.* at 112 (distinguishing employee-created works within scope of employment from works outside scope).

¹⁰⁰ 17 U.S.C. § 201; H.R. REP. NO. 94-1476, at 221-22 (1976); *see* Birnhack, *supra* note 11, at 112; Kim, *supra* note 11, at 343.

¹⁰¹ See 17 U.S.C. § 201; H.R. REP. NO. 94-1476, at 221-22 (defining shop right doctrine of patents as employer acquiring rights to employee's work to extent needed for business purposes); *id.* at 222 (noting that employee retains all other rights as long as employee refrains from authorizing competing uses); *cf.* Kim, *supra* note 11, at 340 (arguing that copyright law's all or nothing approach limits employee protection demonstrated in patent law's shop right doctrine).

California, however, adopted the work for hire doctrine with modifications reflecting greater concern for employee authorship rights.¹⁰² The California work for hire doctrine analyzes both temporal and spatial facts behind the authorship to ensure adequate protection for the individual employee.¹⁰³ Specifically, California automatically assigns authorship to the employer unless the employee developed the invention during nonwork time without using the employer's equipment or trade secrets.¹⁰⁴

Nevertheless, California does not wholly ignore employer rights.¹⁰⁵ The employer owns only employee inventions that relate to the employer's business or result from work performed by the employee for the employer.¹⁰⁶ However, employers may bypass California's work for hire doctrine by entering into express agreements with employees that assign all employee inventions otherwise excluded to employers.¹⁰⁷ Based in part on California's work for hire doctrine, the

¹⁰² CAL. LAB. CODE § 2870 (Deering 2009); see Cherensky, *supra* note 16, at 656 (indicating that statute limited to works invented by employee during corporate time, using corporate resources, or relating to present or anticipated areas of corporate business); cf. Fisk, *Working Knowledge*, *supra* note 22, at 535 (describing conflict between employee's right to work and public's interest in free competition).

¹⁰³ See CAL. LAB. CODE § 2870; Kim, *supra* note 11, at 348 (noting that Ninth Circuit's multifactor test generally holds only formal, salaried employees to be employees under work for hire doctrine). *But see id.* at 348 (arguing that there is no statutory support for dichotomy between commissioned works that are actually supervised and controlled by employer and those that are unsupervised).

¹⁰⁴ See CAL. LAB. CODE § 2870(a); Birnhack, *supra* note 11, at 107; cf. Fisk, *Working Knowledge*, *supra* note 22, at 535 (indicating tension between free labor ideology and corporate demands for increased control of every product of work).

¹⁰⁵ See, e.g., *Enreach Tech., Inc. v. Embedded Internet Solutions, Inc.*, 403 F. Supp. 2d 968, 968-69 (N.D. Cal. 2005) (holding that employee programmer did not forfeit source code developed for employer as source code was standard for embedded internet browser products); cf. Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO L.J. 49, 50 (2006) [hereinafter *Credit Where It's Due*] (arguing that attribution is foundational to modern industrialized economy); Woo, *supra* note 11, at 119 (indicating that independence remains important in authorship, but it is relegated to independent contractor prong of work for hire doctrine).

¹⁰⁶ See CAL. LAB. CODE § 2870(a)(1)-(2); see, e.g., Birnhack, *supra* note 11, at 107 (noting that employer owns works created by employees within scope of employment); Cherensky, *supra* note 16, at 656 (indicating that ownership of works created within scope of employment are assigned to employer rather than employee).

¹⁰⁷ See CAL. LAB. CODE § 2870(b) (allowing for assignment of rights by employee to employer except where employment agreement violates California public policy); cf. Birnhack, *supra* note 11, at 114 (arguing that employers aware of scope of employment test prefer to enter into employment contracts); Gregory M. Mandel, *Left-Brain Versus Right-Brain: Competing Conceptions of Creativity in Intellectual Property Law*, 44 UC DAVIS L. REV. 283, 306 (2010) (indicating that employees often assign away all rights in prospective inventions in exchange for employment).

Ninth Circuit in *Mattel* determined that Mattel did not retain authorship rights to Bratz.¹⁰⁸

II. *MATTEL V. MGA* — HOLDING LIMITED ASSIGNMENT AND THIN COPYRIGHT PROTECTION

Mattel, Inc. v. MGA Entertainment, Inc. details a recent copyright ownership dispute between an employer and employee.¹⁰⁹ In *Mattel*, Carter Bryant worked in Mattel's Barbie Collectibles Department, designing fashion and hairstyles for high-end collectible Barbie dolls.¹¹⁰ In August 2000, while working for Mattel, Bryant created and pitched the Bratz doll idea to MGA Entertainment, Mattel's competitor.¹¹¹ Bryant offered MGA sketches of four preliminary Bratz doll characters, as well as a crude doll prototype created using Mattel parts.¹¹² Bryant signed a consulting agreement with MGA on October 4, 2000, but continued working for Mattel until October 19, 2000.¹¹³ During his final two weeks of employment at Mattel, Bryant developed a Bratz doll sculpt for MGA.¹¹⁴ However, both Bryant and MGA kept Bryant's involvement with Bratz secret.¹¹⁵ Mattel eventually discovered its former employee's involvement with MGA as well as the Bratz doll's

¹⁰⁸ See *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 917-18 (9th Cir. 2010); cf. Birnhack, *supra* note 11, at 112 (arguing that scope of employment test can only be satisfied by causal connection between employment and work); Wadley & Brown, *supra* note 12, at 29 (noting that ownership of copyrighted works is important because author is given exclusive rights over use).

¹⁰⁹ See *Mattel*, 616 F.3d at 907.

¹¹⁰ See *id.*; *Bryant v. Mattel, Inc.*, 573 F. Supp. 2d 1254, 1257 (C.D. Cal. 2007) (indicating hire date as January 1999).

¹¹¹ See *Mattel*, 616 F.3d at 907 (noting that Bryant created Bratz while working at Mattel and used Mattel parts for his first prototype).

¹¹² See *id.* (identifying preliminary sketches as Zoe, Lupe, Hallidae, and Jade, who later became Cloe, Yasmin, Sasha, and Jade, first generation of Bratz dolls); *id.* at 915 (identifying dummy prototype as comprised of doll's head from Mattel bin, Barbie body, and Ken boots).

¹¹³ See *id.* at 907-08 (finding employment contract dated September 18, 2000, despite evidence showing contract signed October 4, 2000); *Bryant*, 573 F. Supp. 2d at 257.

¹¹⁴ See *Mattel*, 616 F.3d at 908 n.1 (defining sculpt as mannequin-like plastic doll body without finishing touches); *Bryant*, 573 F. Supp. 2d at 1257.

¹¹⁵ See *Bryant*, 573 F. Supp. 2d at 1257 (noting that MGA acknowledged and encouraged Bryant's misappropriation of Mattel property); see also *Mattel, Inc.'s Reply Brief on Cross-Appeal* at *5-6, *Mattel, Inc. v. MGA Entm't, Inc.*, No. 09-55812 (9th Cir. Oct. 13, 2009) (arguing that internal MGA memos detailed corporate policy of denying true creator of Bratz).

true lineage, culminating in Mattel's ownership suits against Bryant and MGA.¹¹⁶

During these suits, the parties debated whether Mattel or Bryant owned authorship rights to the Bratz dolls, and whether the works deserved broad or thin protection under the extrinsic/intrinsic test.¹¹⁷ Mattel claimed ownership of Bryant's work product, as well as infringement of substantially similar copyright by MGA.¹¹⁸ MGA countered that Mattel did not own Bryant's work product, and even if it did, copyright protection should be limited and subject to virtually identical analysis.¹¹⁹

The district court and jury found for Mattel on virtually all points.¹²⁰ The jury found that Bryant created the Bratz and Jade names, the preliminary sketches, and the sculpt while still employed by Mattel.¹²¹ Furthermore, the jury found that MGA violated California employment law in its involvement with Bryant and Bratz.¹²² Accordingly, the jury awarded Mattel \$10 million in damages.¹²³ The district court also imposed a constructive trust over all Bratz trademarks, including the term "Bratz," for Mattel's benefit.¹²⁴ The constructive trust functionally transferred the entire Bratz product line to Mattel, which included far more than the initial four characters Bryant created.¹²⁵

On appeal, the Ninth Circuit found multiple errors with the district court's ruling and reversed most of its decision.¹²⁶ First, it found the interpretation of Bryant's employment contract overly broad because the agreement did not clearly assign the Bratz idea to Mattel.¹²⁷ Second, the Ninth Circuit determined that the district court erred in finding that MGA's Bratz dolls infringed any copyright protection

¹¹⁶ See *Mattel*, 616 F.3d at 907-08.

¹¹⁷ See *id.* at 908.

¹¹⁸ See *id.* at 913.

¹¹⁹ See *id.* at 915-16.

¹²⁰ See *id.* at 908.

¹²¹ See *id.*

¹²² See *id.*

¹²³ See *id.* (noting that jury awarded Mattel roughly one percent of requested damages and further speculating that jury perceived small infringement by MGA).

¹²⁴ See *id.* (including Bryant's creation of term Jade in constructive trust). See generally *Bryant v. Mattel, Inc.*, 2008 U.S. Dist. LEXIS 107208 (C.D. Cal. Dec. 3, 2008) (detailing extent of permanent injunction order by district court).

¹²⁵ See *Mattel*, 616 F.3d at 908-09.

¹²⁶ See *id.* at 917-18.

¹²⁷ See *id.* at 909-10 (finding explicitly that Bryant's employment contract excluded transfer of ideas alone to Mattel).

Mattel may hold.¹²⁸ Third, the Ninth Circuit held that the district court improperly extended broad copyright protection instead of thin protection and misused the substantially similar test in place of the virtually identical test.¹²⁹ Finally, the Ninth Circuit noted that America thrives on competition, and therefore Barbie should too.¹³⁰ Thus, the Ninth Circuit found that the district court erred by assigning the Bratz doll line to Mattel and remanded the case for further proceedings.¹³¹

The Ninth Circuit's *Mattel* holding established a broad protection of competition and required only a minimal amount of originality.¹³² By extending thin protection to the works, the court ensured that the idea of bratty dolls remained in the public domain for public use.¹³³ Further, the court took a strong stance by requiring only the most limited amount of originality to establish ownership.¹³⁴ Despite the many forms dolls take, the court found that the narrow range of expressions for bratty dolls required the thin protection associated with public domain ideas.¹³⁵ Because the works were only afforded thin protection, copying had to be vitually identical to infringe the copyright protection of the original work. However, the Ninth Circuit's *Mattel* holding incorrectly applied both copyright and employment law in denying Mattel's copyright infringement actions.¹³⁶

¹²⁸ See *id.* at 913.

¹²⁹ See *id.* at 914-15.

¹³⁰ See *id.* at 918.

¹³¹ See *id.* at 917-18.

¹³² See *id.* at 917; cf. *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1445 (9th Cir. 1994) (holding that originality is another doctrine that limits scope of copyright protection); Miller, *supra* note 50, at 473 (arguing that originality requires independent creation plus some creativity).

¹³³ See *Mattel*, 616 F.3d at 917; Carol J. Williams & Andrea Chang, *Mattel Win is Reversed in Bratz Case; MGA is Entitled to Sweat Equity for Turning Dolls into a Success*, *Court Says*, L.A. TIMES, July 23, 2010, at B1; cf. Wilf, *supra* note 20, at 147 (arguing that use of efficiency arguments to promote copyright protection as good for economy ignores possible detriment to public good).

¹³⁴ See *Mattel*, 616 F.3d at 918; Andrea Chang, *Saucy Bratz Dolls Make a Comeback; MGA Relaunches the Once-Hot Brand With a Slightly More Demure Look*, L.A. TIMES, Sept. 18, 2010, at B1; Williams & Chang, *supra* note 133, at B1.

¹³⁵ See *Mattel*, 616 F.3d at 917.

¹³⁶ See *id.* at 917-18; cf. Catherine Fisk, *Authors at Work: The Origins of the Work-for-Hire Doctrine*, 15 YALE J.L. & HUMAN. 1, 2 (2003) [hereinafter *Authors at Work*] (indicating that creative process is both inherently individual and inescapably social, creating problems for judicial interpretation); Mandel, *supra* note 107, at 301 (arguing that courts continue to mistakenly rely on sense of equity in attempting to protect only primary authors).

III. ANALYSIS

The Ninth Circuit's ruling in *Mattel* improperly disregarded the district court's holding as incorrect by finding only limited copyright assignment and thin copyright protection.¹³⁷ First, the Ninth Circuit misinterpreted the express employment agreement between Mattel and Bryant, and the court misapplied the work for hire doctrine.¹³⁸ Second, the works deserve broad rather than thin copyright protection because they represented original expressions of protectable ideas.¹³⁹ Finally, courts must provide greater copyright protection to the employers of creative individuals to encourage employers to continue creative development and innovation.¹⁴⁰

A. *The Ninth Circuit Misconstrued the Express Employment Contract and Misapplied the Work for Hire Doctrine*

Copyright owners must establish three criteria for a court to find copyright infringement.¹⁴¹ There must be ownership of the infringed work, infringer access to the expressions of ideas, and a resulting product substantially similar to the infringed work.¹⁴² First, Mattel owned Bryant's works under both the express employment contract and the work for hire doctrine.¹⁴³ Second, Bryant provided the infringer access by giving the works to MGA.¹⁴⁴ Finally, the dolls

¹³⁷ See *Mattel*, 616 F.3d at 917-18; *infra* Part III (analyzing Ninth Circuit's misapplication of relevant copyright law and doctrine); *cf.* Mandel, *supra* note 107, at 243 (displaying surprise at socio-cultural staying power of myth of individual creator). See generally Lunney, Jr., *Reexamining*, *supra* note 18 (advocating for reconception of copyright to incentives-access paradigm in order to avoid such confusions in copyright protection cases).

¹³⁸ See *Mattel*, 616 F.3d at 911-13; *infra* Part III.A (analyzing employment relationship and work for hire doctrine).

¹³⁹ See *infra* Part III.B (analyzing extrinsic/intrinsic test to determine if court should extend broad rather than thin copyright protection).

¹⁴⁰ See *infra* Part III.C (considering *Mattel*'s broad policy implication on modern innovation).

¹⁴¹ See *Berkic v. Crichton*, 761 F.2d 1289, 1291 (9th Cir. 1985); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1162 (9th Cir. 1977); *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 741 (9th Cir. 1971).

¹⁴² See *Mattel*, 616 F.3d at 913; sources cited *supra* note 141 (describing three criteria that plaintiff must demonstrate in copyright infringement case).

¹⁴³ See *infra* Part III.A (looking at employment relationship between Mattel and Bryant to determine application of work for hire doctrine).

¹⁴⁴ See Williams & Chang, *supra* note 133, at B1; Ann Zimmerman, *MGA Wins Back Bratz Dolls*, WALL ST. J., July 23, 2010, at B1, available at <http://online.wsj.com/article/SB10001424052748703467304575383321206900194.html>; *cf.* Woo, *supra* note 11, at 124 (arguing that party's potential ability to become author

produced by MGA — the first generation as well as later generations — were substantially similar to the expressions of ideas owned by Mattel.¹⁴⁵

The Ninth Circuit incorrectly overruled the district court's finding for the first requirement — ownership — based on the employment contract and the work for hire doctrine.¹⁴⁶ The employment contract expressly and explicitly assigned all works that Bryant created as an employee to Mattel.¹⁴⁷ Because Bryant created the Bratz doll prototype during his work hours at Mattel, his employment contract mandated assigning Bratz ownership to Mattel. Thus, the Ninth Circuit erred by assigning the Bratz doll line to Mattel.¹⁴⁸

The employment contract between Bryant and Mattel clearly indicates that Mattel owned the works created by Bryant.¹⁴⁹ Further, the district court found that the contract covered any doll or dolls fashioned in the scope of employment.¹⁵⁰ The Ninth Circuit, however, determined that the contract lacked specificity to determine ownership because the contract only covered works completed during employment, not ideas developed during employment.¹⁵¹ This decision resulted from a misapplication of copyright considerations in favor of

often becomes important consideration in deciding infringement, shifting focus from work to authorship).

¹⁴⁵ See *Mattel*, 616 F.3d at 915-16; cf. *Data E. USA, Inc. v. EPYX, Inc.*, 862 F.2d 204, 206 (9th Cir. 1988) (holding that because direct evidence of copying is rarely available, copying may be established by circumstantial evidence of defendants access to copyrighted work); *Berkic*, 761 F.2d at 1293 (finding that nothing in Hollywood, and in general, is actually new).

¹⁴⁶ 17 U.S.C. §§ 101, 201 (2006); see *Mattel*, 616 F.3d at 913-14 (holding if ownership extended to original sketches and dolls only, district court's decision should still be remanded); cf. *Birnhack*, *supra* note 11, at 107 (demonstrating that ownership of works created by employees within scope of employment is assigned to employers).

¹⁴⁷ See *Mattel*, 616 F.3d at 912; *Kim*, *supra* note 11, at 343; *Loretto*, *supra* note 14, at 715.

¹⁴⁸ See *Mattel*, 616 F.3d at 917-18; *Kim*, *supra* note 11, at 344; cf. *Mandel*, *supra* note 107, at 317 (arguing that perceived difference between creation and invention leads courts to more quickly provide individual with copyright protection than is necessary).

¹⁴⁹ See *Mattel*, 616 F.3d at 907; *Bryant v. Mattel, Inc.*, 573 F. Supp. 2d 1254, 1257 (C.D. Cal. 2007); cf. *Mandel*, *supra* note 107, at 306 (indicating that employees are routinely required to assign any rights in inventions to employers).

¹⁵⁰ See *Mattel*, 616 F.3d at 912; *Bryant v. Mattel, Inc.*, No. 04-9049, 2008 U.S. Dist. LEXIS 107208, at *8-11 (C.D. Cal. Dec. 3, 2008); *Bryant*, 573 F. Supp. 2d at 1257.

¹⁵¹ See *Mattel*, 616 F.3d at 912-13; *Bryant*, 573 F. Supp. 2d at 1257; cf. *Cherensky*, *supra* note 16, at 598 (arguing that employment contracts for pre-inventions are valid as they transfer intangible expectancies).

the individual author where the employer properly owned the Bratz doll line.¹⁵²

The employment contract mutually entered into between Mattel and Bryant provided for the transfer of expressions of ideas to Mattel.¹⁵³ Bryant's employment contract with Mattel, as the Ninth Circuit agreed, did not include the transfer of mere ideas.¹⁵⁴ Finding the line between ideas and expressions of ideas is difficult to determine in most situations.¹⁵⁵ The Ninth Circuit particularly struggled with this determination and erroneously concluded that Bryant did not express his ideas for the Bratz dolls until after leaving Mattel. However, Bryant's idea of the Bratz line clearly passed to an expression of an idea via physical manifestation of the Bratz idea.¹⁵⁶ Preliminary sketches, a specific name, a dummy prototype, and a preliminary sculpt indicate that Bratz was a physical expression deserving of copyright protection.¹⁵⁷ Thus, the express employment agreement covered

¹⁵² Cf. Kim, *supra* note 11, at 346 (noting that Second Circuit courts have focused work for hire examination on actual relationship between parties rather than express agreements); Cherensky, *supra* note 16, at 598 (arguing that both employees and employers have strong proprietary interests in inventions that result from employment relationship). *But see* Fisk, *Credit Where It's Due*, *supra* note 105, at 55 (arguing that American society has improperly shifted to favoring corporate rights).

¹⁵³ See *Mattel*, 616 F.3d at 907; *Bryant*, 573 F. Supp. 2d at 1257; Birnhack, *supra* note 11, at 99 (noting that works made by employees within scope of employment belong to employer, commissioned works belong to commissioner, and all other works belong to author).

¹⁵⁴ See *Mattel*, 616 F.3d at 907-08; *Bryant*, 573 F. Supp. 2d at 1257; cf. *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 761 (9th Cir. 1971) (holding that copyright allows other authors to utilize common ideas in a work so long as they do not plagiarize their expression).

¹⁵⁵ See, e.g., *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1163 (9th Cir. 1977) (finding difficulty in distilling protected from unprotected elements); *Herbert Rosenthal Jewelry Corp.*, 446 F.2d at 742 (quoting *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (Hand, J.)) (noting that no express conditions can be set to determine when imitator has gone beyond copying idea to expression); Lunney, Jr., *Copyright and Computer Programs*, *supra* note 13, at 2402 (indicating difficulty in identifying original elements of work that constitute unprotected idea).

¹⁵⁶ See *Mattel*, 616 F.3d at 907-08; see, e.g., *Sid & Marty Krofft Television Prods.*, 562 F.2d at 1169 (extending copyright protection where expression of characters differed markedly its relatively simple idea). *But see* Lunney, Jr., *Reexamining*, *supra* note 18, at 505 (indicating difficulty in separating idea from expression).

¹⁵⁷ See *Mattel*, 616 F.3d at 907-08; see, e.g., *Sid & Marty Krofft Television Prods.*, 562 F.2d at 1163 n.5 (noting that work offered for registration need only be original in sense of contributing something more than merely trivial variation — something recognizably author's own); cf. *Wadley & Brown*, *supra* note 12, at 33 (arguing that work for hire doctrine allows employer vicarious means of acquiring status of authorship that would otherwise belong to actual creator).

Bryant's expression of the Bratz doll line, which would correctly transfer ownership to Mattel.¹⁵⁸

The Ninth Circuit also improperly analyzed the scope of employment to determine ownership under the contract.¹⁵⁹ Although the court correctly analyzed Bryant's role in the company in assessing scope of employment, the court failed to consider other relevant employment and copyright issues.¹⁶⁰ The court determined that Bryant's position in Barbie Collectibles precluded an interpretation that the creation of new dolls was part of his employment under his contract with Mattel.¹⁶¹ This interpretation, however, fails to consider the nature of the invention and the time and place of invention.¹⁶² These considerations are necessary to properly assess the assignment of ownership either to the employee or to the employer. Bryant utilized Mattel's materials to create the initial expressions of the Bratz idea during his work hours at Mattel.¹⁶³ Further, Mattel hired Bryant in a creative capacity, surrounded by creative individuals, and provided Bryant with the resources necessary to foster creativity.¹⁶⁴ Mattel fostered the creativity underlying Bryant's ideas and expressions of ideas. Factors such as time and place of Bryant's invention reveal that the scope of his employment was inherently

¹⁵⁸ See *Bryant v. Mattel, Inc.*, No. 04-9049, 2008 U.S. Dist. LEXIS 107208, at *8-11 (C.D. Cal. Dec. 3, 2008); *Jury Awards \$100 Million to Mattel*, N.Y. TIMES, Aug. 27, 2008, at 7 (reporting jury verdict); cf. *Wadley & Brown*, *supra* note 12, at 33 (indicating that work for hire doctrine modifies concept of authorship to enable copyright to be claimed by employer rather than employee).

¹⁵⁹ See *Mattel*, 616 F.3d at 911-12 (indicating court's suspicion of contract as precondition of employment); *Cubic Corp. v. Marty*, 229 Cal. Rptr. 828, 833 (Ct. App. 1986) (holding that employment agreement was condition of employment but that employment was adequate consideration for agreement). *But see* Suellen Lowry, *Inevitable Disclosure Trade Secret Disputes: Dissolutions of Concurrent Property Interests*, 40 STAN. L. REV. 519, 532 (1988) (arguing that employees are not often fully compensated for rights they give up, creating employment inequity).

¹⁶⁰ See *Mattel*, 616 F.3d at 912; *Kim*, *supra* note 11, at 348 (indicating that courts may consider such factors as source of instrumentalism, location of work, and whether work is part of regular business of employer).

¹⁶¹ See *Mattel*, 616 F.3d at 912; *Loretto*, *supra* note 14, at 725.

¹⁶² See *Wadley & Brown*, *supra* note 12, at 33 (indicating that work for hire doctrine only applies to works created within scope of employment); cf. *Mandel*, *supra* note 107, at 317-18 (arguing that people incorrectly associate artistic creativity with entirely individualistic process rather than as group process). *But see* *Fisk*, *Credit Where It's Due*, *supra* note 105, at 50 (determining that intellectual property law does not adequately protect right of attribution).

¹⁶³ See *Mattel*, 616 F.3d at 907.

¹⁶⁴ See *id.*

creative in nature.¹⁶⁵ Therefore, an invention of a new doll line was not outside of his scope of employment due to Bryant's creative employment capacity.¹⁶⁶ Accordingly, Bryant's express employment contract provided for the transfer of all works he created to Mattel. Thus, by failing to consider critical factors surrounding Bryant's employment, *Mattel* incorrectly interpreted the scope of his express employment contract.¹⁶⁷

Even if the express employment agreement failed, the Ninth Circuit incorrectly held that the work for hire doctrine did not assign ownership to Mattel.¹⁶⁸ As refined by California Labor Code § 2870, works of employees are assigned to the employer if they relate to the business of the employer.¹⁶⁹ Thus, in employment settings, authorship passes from the employee to the employer under the work for hire doctrine.¹⁷⁰

¹⁶⁵ See *Bryant v. Mattel, Inc.*, 573 F. Supp. 2d 1254, 1257 (C.D. Cal. 2007); cf. *Cubic Corp. v. Marty*, 229 Cal. Rptr. 828, 833-34 (Ct. App. 1986) (holding that employee may not have been design employee, but scope of employment did not preclude design work); Kim, *supra* note 11, at 353 (describing how Second Circuit struggled with employer's lack of control over employee, but still found creative employee relationship).

¹⁶⁶ See *Bryant*, 573 F. Supp. 2d at 1257; cf. Birnhack, *supra* note 11, at 152 (noting that employees are more likely to understand their capabilities when agreeing to new employment agreements); Cherensky, *supra* note 16, at 619 (indicating that employment contracts may not be enforced if employer attempts to appropriate inventions unrelated in subject matter to employment relationships).

¹⁶⁷ See *Mattel*, 616 F.3d at 607-08; *Bryant v. Mattel, Inc.*, No. 04-09049, 2008 U.S. Dist. LEXIS 63391, at *9-10 (C.D. Cal. July 24, 2008); cf. Wadley & Brown, *supra* note 12, at 35 (describing broad scope of employment and providing extreme example of employees filming unsanitary employment practices as finally breaching scope of their employment).

¹⁶⁸ See *Mattel*, 616 F.3d at 910-12; cf. Kim, *supra* note 11, at 344 (noting that statutory default favors ownership by employer where work is prepared by employee within scope of employment); Woo, *supra* note 11, at 117 (indicating presumption of courts is that creator of work is owner for copyright purposes, but presumption is overcome if work is made for hire).

¹⁶⁹ CAL. LAB. CODE § 2870 (Deering 2009); see *Mattel*, 616 F.3d at 912 n.5; cf. Birnhack, *supra* note 11, at 141-42 (arguing that old test of ownership based on agency law is obsolete; better to analyze employer's activity and specific work).

¹⁷⁰ See, e.g., David L. Hitchcock, *Co-operative Development of Technology: Understanding the Risks and Creating Opportunities to Excel*, 9 COMP. L. REV. & TECH. J. 233, 237 (2004) (indicating that work for hire doctrine transfers authorship to employer if produced by employees within scope of their duties); Wadley & Brown, *supra* note 12, at 33 (noting that work for hire doctrine extends status of authorship to employer in certain situations); Loretto, *supra* note 14, at 716 (arguing that statutory work for hire doctrine transfers ownership of copyright of work created by employee to employer).

The work for hire doctrine applies in this situation because Mattel hired Bryant in a creative capacity as a designer in the Barbie Collectibles Department.¹⁷¹ The creative nature of Bryant's employment included creating original doll-related content.¹⁷² Bryant's Bratz work also directly related to Mattel's business practice — making fashion dolls.¹⁷³ Further, Bryant created the Bratz expressions while at work using company time and materials.¹⁷⁴ Thus, even without an effective employment agreement, Mattel clearly owned the expressions of the Bratz line under the work for hire doctrine.¹⁷⁵ Therefore, the court in *Mattel* erred by assigning the Bratz doll line to MGA after misinterpreting the work for hire doctrine.¹⁷⁶

Some critics argue that sweat equity should preserve employee ownership rights, and, therefore, the Ninth Circuit properly assigned the Bratz ownership to Bryant and MGA.¹⁷⁷ The ruling in *Mattel* indicates the Ninth Circuit's aggressive stance on defending employee ownership rights.¹⁷⁸ Finding copyright ownership between employers

¹⁷¹ See *Mattel*, 616 F.3d at 907; *Bryant*, 2008 U.S. Dist. LEXIS 63391, at *9; cf. Fisk, *Credit Where It's Due*, *supra* note 105, at 58 (arguing that it is possible to preserve entrepreneurial spirit of individual within corporate bureaucratic framework).

¹⁷² See *Mattel*, 616 F.3d at 907.

¹⁷³ See *Bryant v. Mattel, Inc.*, 573 F. Supp. 2d 1254, 1257 (C.D. Cal. 2007); *Mattel History*, MATTEL INC. (Jan. 9, 2011), <http://corporate.mattel.com/about-us/history/default.aspx> (indicating that Barbie doll led Mattel's business for fifty-one years); cf. C. Owen Paepke, *An Economic Interpretation of the Misappropriation Doctrine: Common Law Protection for Investments in Innovation*, 2 HIGH TECH. L.J. 55, 56 (1987) (identifying importance of innovation to companies in developed economies); Woo, *supra* note 11, at 117-18 (declaring that author is master rather than servant — owner of work is commissioner not contractor).

¹⁷⁴ See *Mattel*, 616 F.3d at 907.

¹⁷⁵ See Kim, *supra* note 11, at 344; Loretto, *supra* note 14, at 716. *But see* Woo, *supra* note 11, at 117 (arguing that work for hire doctrine alienates author by taking rights away and granting them to employer).

¹⁷⁶ See *Mattel*, 616 F.3d at 917-18; cf. Birnhack, *supra* note 11, at 107 (indicating that copyright protection of work created within scope of employment is assigned to employer); Cherenky, *supra* note 16, at 656 (noting that authorship of work created within scope of employment belongs to employer).

¹⁷⁷ In economics, sweat equity is the work or effort put into a project that increases its value, rather than simply capital. See generally Miller, *supra* note 50 (discussing focus on individual participation in invention process); Hanna Bui-Eve, Note, *To Hire or Not to Hire: What Silicon Valley Companies Should Know About Hiring Competitors' Employees*, 48 HASTINGS L.J. 981 (1997) (arguing that too great of deference to employers in creative fields leads to industry stagnation); Lowry, *supra* note 159 (discussing importance of protecting individuals in context of expanding trade secret claims by corporations).

¹⁷⁸ Cf. Fisk, *Credit Where It's Due*, *supra* note 105, at 55 (arguing for importance of attributing authorship to actual person rather than corporations); Sell, *supra* note 21,

and employees necessarily involves balancing the interests of both parties.¹⁷⁹ By finding that the assignment of the work was at best unclear, the Ninth Circuit protected the interest of the individual author over the employer.¹⁸⁰ In *Mattel*, the court protected the powerless employee and ensured that the true author maintained ownership.¹⁸¹ While the Ninth Circuit's decision did not specifically address sweat equity, these critics would argue that Bryant and MGA owned the Bratz doll line due to Bryant's creation of Bratz.¹⁸²

These critics' argument fails, however, because copyright law requires the court to balance employee rights against employer rights to determine ownership.¹⁸³ Whereas the individual holds some ownership rights as the original author, the employer bears all risk-

at 318 (determining through historical analysis of intellectual property law that corporations enjoy greatly inflated copyright protection due to lobbying efforts); Wadley & Brown, *supra* note 12, at 35 (arguing that law will not arbitrarily attribute authorship to employer simply because employee produced work during employment).

¹⁷⁹ Cf. Birnhack, *supra* note 11, at 151-52 (noting that employees may not know about allocation under copyright law while employer is likely to be very knowledgeable); Sell, *supra* note 21, at 268 (indicating that inherent tension between Romantic and utilitarian justifications of property rights underlies and forms American intellectual property law); Lowry, *supra* note 159, at 519 (arguing that employers seek to restrict disclosure of confidential information and employees find such restrictions impair ability to market skills to new employers).

¹⁸⁰ See *Mattel*, 616 F.3d at 912; Birnhack, *supra* note 11, at 149-50 (identifying pervasiveness of unfairness in employment law and that employees need protection); cf. Lowry, *supra* note 159, at 537 (indicating that employer ownership of workplace is not absolute for trade secrets).

¹⁸¹ Cf. Miller, *supra* note 50, at 493 (arguing that work is personal reaction of individual upon nature and focus is whether work shows author's personal reaction); Bui-Eve, *supra* note 177, at 983 (recounting how too much deference and employee loyalty to employer led to stagnation of Boston's Route 128 technology sector); Cherenksy, *supra* note 16, at 662-63 (using Radin's argument that inventor's interest should be protected because works contribute to inventor's self conception in ways inseparable from inventive process).

¹⁸² Cf. Fisk, *Authors at Work*, *supra* note 136, at 5 (arguing that authorship by corporations is legal fiction without reasonable explanation for its existence); Sell, *supra* note 21, at 272 (indicating that copyrights, like monopolies, are dangerous devices to be wary of); Wadley & Brown, *supra* note 12, at 36 (arguing that works are excluded from employer ownership if parties cannot anticipate creation of those works).

¹⁸³ 17 U.S.C. § 201 (2006); cf. Wadley & Brown, *supra* note 12, at 33 (indicating that employer may have significantly supported creation of employee's work by taking economic risks and therefore may wish to claim interest in work). *But see id.* at 35 (arguing that it is possible employee will create works that are completely serendipitous to employment and not at all contemplated by scope of employment).

taking and therefore deserves certain ownership rights as well.¹⁸⁴ Further, the employer provides compensation for the employee's work and provides facilities and equipment to foster creativity.¹⁸⁵ The Copyright Act similarly acknowledges employers as an integral part of the modern invention process by preserving employer ownership rights.¹⁸⁶ Therefore, employers own the legal rights to their employees' inventions when they directly result from employment.¹⁸⁷ Thus, in *Mattel*, the balancing test tips in favor of protecting the employer because of the employment relationship existing between the parties.¹⁸⁸

B. The Ninth Circuit Incorrectly Applied the Virtually Identical Test Instead of the Substantially Similar Test

For the third requirement of copyright protection — similarity of works — the Ninth Circuit court incorrectly applied the virtually identical test instead of the substantially similar test.¹⁸⁹ All of the MGA-produced Bratz dolls contained the original expressions created by Bryant — bratty dolls with urban attitude presented in an original manner.¹⁹⁰ This originality of expression means the works deserved

¹⁸⁴ See Wadley & Brown, *supra* note 12, at 33; *cf.* Fisk, *Authors at Work*, *supra* note 136, at 1 (indicating that modern author is not dead; modern author simply grew up and got employed); Mandel, *supra* note 107, at 326 (noting that courts perceive creative process as ineffable and beyond employer's control).

¹⁸⁵ See *Mattel, Inc.*, Annual Report (Form 10-K), at 29, (Dec. 12, 2009) (indicating administrative expenses of \$1.37 billion in 2009 alone); Wadley & Brown, *supra* note 12, at 33; *cf.* Fisk, *Credit Where It's Due*, *supra* note 105, at 53-54 (indicating extremely high price of human capital in information economy).

¹⁸⁶ See 17 U.S.C. § 201; Wadley & Brown, *supra* note 12, at 32 (arguing that Copyright Act is compromise between interests of employer and employee); *cf.* Fisk, *Credit Where It's Due*, *supra* note 105, at 54 (arguing that intellectual property is divorced from creators and reassigned to employers).

¹⁸⁷ See 17 U.S.C. § 201; *cf.* Fisk, *Authors at Work*, *supra* note 136, at 4 (noting that attribution of authorship is proof of cultural attribution); Wadley & Brown, *supra* note 12, at 33 (giving authorship to employee would deprive employer of right to control developments that result directly from employment).

¹⁸⁸ See *Bryant v. Mattel, Inc.*, 573 F. Supp. 2d 1254, 1257 (C.D. Cal. 2007); Zimmerman, *supra* note 144, at B1; *cf.* Wadley & Brown, *supra* note 12, at 36 (indicating that parties must bear task of determining scope of during creation of relationship).

¹⁸⁹ See *Bryant*, 573 F. Supp. 2d at 1257; *Satava v. Lowry*, 323 F.3d 805, 808-09 (9th Cir. 2003); *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994).

¹⁹⁰ See *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 907 (9th Cir. 2010).

broad copyright protection from infringement. Thus, the district court clearly and correctly established Mattel's copyright.¹⁹¹

After establishing that a copyright exists, courts must use the the extrinsic/intrinsic test to determine the scope of copyright protection.¹⁹² Under the extrinsic prong of the test, the court removes all nonprotectable elements so that only protectable expressions of ideas remain.¹⁹³ In *Mattel*, the district court filtered out similarity to human form, presence of human features, standard doll features, and standard treatment of subject matter.¹⁹⁴ Protectable elements, however, included the particularized compilation of expression and human form, expression of anatomical features, and nonfunctional attire.¹⁹⁵ These original particularized features were new and unique to the Bratz dolls and, therefore, met copyright protection requirements.¹⁹⁶ Similarly, using the intrinsic test, an ordinary reasonable observer would determine that the protected elements from Bryant's works were present in MGA's dolls.¹⁹⁷ Because of the breadth of expression of within the

¹⁹¹ See *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 741 (9th Cir. 1971) (finding inference of copying based upon similar appearance lost strength because works were lifelike representations of natural creature, but there were differences); *Bryant v. Mattel, Inc.*, No. 04-09049, 2008 U.S. Dist. LEXIS 63391, at *9-10 (C.D. Cal. July 24, 2008). *But see Satava*, 323 F.3d at 809 (holding that defendant admitted to seeing photograph of sculpture and examined actual sculpture, but no copyright protection due to thin protection).

¹⁹² See *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 900 (9th Cir. 1987) (holding that extrinsic test used to determine similarity of works is objective and intrinsic test used to compare forms of expression is subjective); *Bryant*, 2008 U.S. Dist. LEXIS 63391, at *3-4; Dutra, *supra* note 48, at 419.

¹⁹³ See, e.g., *Apple Computer*, 35 F.3d at 1443 (using analytic dissection to determine scope of copyright protection); *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir. 1985) (finding extrinsic test allows court to employ analytic dissection); Woo, *supra* note 11, at 121 (indicating that analytic dissection and detailed analysis of works are employed to determine similarity of works in order to place works on equal plane).

¹⁹⁴ See *Mattel*, 616 F.3d at 914 (defining *scenes a faire* as standard treatments of subject matter); *Bryant*, 2008 U.S. Dist. LEXIS 63391, at *3.

¹⁹⁵ See *Mattel*, 616 F.3d at 914; *Satava*, 323 F.3d at 810; *cf. Data E. USA, Inc. v. EPYX, Inc.*, 862 F.2d 204, 208 (9th Cir. 1988) (finding expressions that are indispensable or standard in treatment of given idea to be nonprotectable).

¹⁹⁶ See *Mattel*, 616 F.3d at 907; Chang, *supra* note 134, at B1; Zimmerman, *supra* note 144, at B1.

¹⁹⁷ See, e.g., *Data E. USA*, 862 F.2d at 208 (holding that intrinsic test is used to compare forms of expression and is subjective — depends on response of ordinary reasonable person); *Aliotti*, 831 F.2d at 902 (holding that because children are intended market for dolls, courts must filter intrinsic inquiry through perception of children); Woo, *supra* note 11, at 122 (describing intrinsic test as question of similarity determined by average lay observer).

dolls, the district court correctly granted broad copyright protection and found infringement under the substantially similar test.¹⁹⁸

The Ninth Circuit, however, misapplied the extrinsic/intrinsic test to determine that the works only deserved thin protection under the virtually identical test.¹⁹⁹ Under the extrinsic test, the Ninth Circuit held that the district court failed to filter out all of the nonprotectable elements.²⁰⁰ For example, Mattel could not claim a monopoly over aggressive, contemporary, and youthfully styled fashion dolls.²⁰¹ The Ninth Circuit then erred by filtering out original, unique, and particularized expressions of originality.²⁰² Specifically, the court improperly removed particularized facial and anatomical features, such as the lips, nose, and chin.²⁰³ These expressions are protectable because they are common ideas of human expression that apply in a narrow way to female fashion dolls.²⁰⁴ The fashion doll market allows for broad ranges of expressions, and MGA was not limited to producing fashion dolls substantially similar to the Bratz dolls.²⁰⁵

¹⁹⁸ See *Mattel*, 616 F.3d at 908; *Bryant*, 2008 U.S. Dist. LEXIS 63391, at *6-7 (citing *Satava*, 323 F.3d at 808-09) (differentiating broad artistic expression based on drawing from thin glass-in-glass sculpture protection).

¹⁹⁹ See *Mattel*, 616 F.3d at 913-16; *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1439 (9th Cir. 1994); *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985).

²⁰⁰ See *Mattel*, 616 F.3d at 916-17; *Dutra*, *supra* note 48, at 419 (arguing that district court failed to exclude common ideas); *cf. Aliotti*, 831 F.2d at 901 (holding that dissection of dissimilarities is inappropriate because it distracts reasonable observer from comparison of total concept and feel of works).

²⁰¹ See *Mattel*, 616 F.3d at 916-17; *Williams & Chang*, *supra* note 133, at B1; *Zimmerman*, *supra* note 144, at B1.

²⁰² See *Mattel*, 616 F.3d at 916; *Babbin et al.*, *supra* note 83, at 1071; *Stephanie Francis Ward, You're Protected, Dollface: 2nd Circuit Finds Barbie is One of a Copyrighted Kind*, 3 A.B.A. J. E-REP. 2, 2 (2004).

²⁰³ See *Mattel*, 616 F.3d at 914; *Bryant*, 2008 U.S. Dist. LEXIS 63391, at *5-10; *cf. Ward*, *supra* note 202, at 2 (stressing importance of particularized expressions and features in doll industry).

²⁰⁴ *Cf. Babbin et al.*, *supra* note 83, at 1071 (noting that Second Circuit found Barbie's stylized face sufficiently novel so as to warrant copyright protection); *Chang*, *supra* note 134, at B1 (indicating importance of specific features of dolls in determining market success). *But see Data E. USA, Inc. v. EPYX, Inc.*, 862 F.2d 204, 207 (9th Cir. 1988) (holding that plaintiff must first show that ideas are substantially similar, but ideas themselves are not protected and cannot be infringed).

²⁰⁵ See, e.g., *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 740 (9th Cir. 1971) (holding that there is requirement that work differ substantially from prior works or that it contributes anything of value; copyright protects originality rather than novelty); *Chang*, *supra* note 134, at B1 (noting MGA's attempted transformation of Bratz dolls to appeal to greater range of consumers); *Our Toys, MATTEL INC.* (Jan. 9, 2011), <http://corporate.mattel.com/our-toys/default.aspx> (displaying eleven distinct

Therefore, the Ninth Circuit erred by limiting copyright protection under the extrinsic prong of the test.²⁰⁶ Under the correct application of the extrinsic/intrinsic test, Mattel deserves broad copyright protection.²⁰⁷

Mattel owned expressions of ideas that constituted original works of authorship and necessitated broad copyright protection.²⁰⁸ In the female fashion doll market, there is a multitude of possible forms of expression for various ideas.²⁰⁹ Bratz, as evidenced by distinctive physical appearance and incredible market success, offered a unique and different product in the fashion doll market.²¹⁰ The compilation of distorted features and stylized looks created an original niche within the fashion doll market.²¹¹ Thus, using broad copyright protection, any Bratz dolls produced by MGA substantially infringed upon Mattel's copyright that attached to Bryant's works at the moment of fixation.²¹²

types of female dolls targeted at children).

²⁰⁶ See *Mattel*, 616 F.3d at 917; cf. Lunney, Jr., *Reexamining*, *supra* note 18, at 531 (arguing that copyright law limited by range of expression available to ensure that later authors have adequate freedom to pursue their own creativity); Brashears-Macatee, *supra* note 19, at 920 (indicating that total feel approach does little to clarify convoluted issue of substantial similarity).

²⁰⁷ See *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994); *Data E. USA*, 862 F.2d at 208; *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir. 1985).

²⁰⁸ See *Mattel*, 616 F.3d at 913-14; cf. *Apple Computer*, 35 F.3d at 1443 (finding that similarities derived from use of common ideas cannot be protected, otherwise first to invent idea will corner market); *Data E. USA*, 862 F.2d at 208 (holding that no substantial similarity of expression will be found when idea and its expression are inseparable).

²⁰⁹ See sources cited *supra* note 205.

²¹⁰ See *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 900 (9th Cir. 1987) (holding that court must consider total concept and feel of products to determine copying); *Bryant v. Mattel, Inc.*, No. 04-09049, 2008 U.S. Dist. LEXIS 63391, at *8-10 (C.D. Cal. July 24, 2008); cf. *Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003) (holding that there must be something more than trivial variation, something recognizably artist's own to prevent copying).

²¹¹ See, e.g., *Babbin et al.*, *supra* note 83, 1070-71 (indicating that Second Circuit found Barbie's upturned nose, bow lips, and widely spaced eyes to possess minimum degree of creativity necessary for protection); cf. *Ward*, *supra* note 202, at 2 (noting that while dolls may have similar features, infringement is ultimately question about particularized expression); *Chang*, *supra* note 134, at B1 (indicating that female fashion dolls succeed or fail based on how consumers react to individualized products).

²¹² See *Bryant v. Mattel, Inc.*, No. 04-9049, 2008 U.S. Dist. LEXIS 107208, at *9-12 (C.D. Cal. Dec. 3, 2008); *Bryant*, 2008 U.S. Dist. LEXIS 63391, at *8-9. *But see* *Dutra*, *supra* note 48, at 419 (arguing that later generations of Bratz dolls looked nothing like originals, implying that district court should have used virtually identical test).

Some jurists argue that copyright protection permits significant leeway in copying expressions of ideas where some originality exists or where protection is inappropriate.²¹³ These jurists maintain that, at the most basic level, the Bratz dolls are female fashion dolls with an attitude.²¹⁴ Thin protection is appropriate for dolls and items that present an attitude in general.²¹⁵ Because the Bratz dolls are only dolls with an attitude, they are comprised entirely of nonprotectable elements.²¹⁶ The ideas of representation of human form exhibiting a certain urban attitude merge with the expression of the idea.²¹⁷ Where there is merger of idea and expression, only limited copyright protection extends against exact copying. Therefore, some jurists believe there is only a limited range of expression for MGA to have created Bratz dolls such that thin copyright protection is appropriate.²¹⁸

This analysis by the Ninth Circuit in *Mattel* fails, however, because it ignores the originality in the Bratz line of dolls.²¹⁹ The central

²¹³ See, e.g., *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (indicating that originality requirement of copyright law is not particularly stringent and does not require novelty); *Apple Computer*, 35 F.3d at 1444 (holding that when idea and its expression are indistinguishable or merged, expression will only be protected against nearly identical copying); Litman, *supra* note 24, at 1729 (arguing for less widespread application of intellectual property restrictions).

²¹⁴ See *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 907 (9th Cir. 2010); Williams & Chang, *supra* note 133, at B1; Zimmerman, *supra* note 144, at B1.

²¹⁵ See *Aliotti*, 831 F.2d at 901 (9th Cir. 1987); Dutra, *supra* note 48, at 419 (arguing that production of small plastic dolls that resemble young females is staple of fashion doll market); cf. *Data E. USA, Inc. v. EPYX, Inc.*, 862 F.2d 204, 208 (9th Cir. 1988) (finding that where idea and expression coincide, only identical copying will be protected against).

²¹⁶ See *Mattel*, 616 F.3d at 914; Dutra, *supra* note 48, at 419 (indicating that basic concept of depicting young fashion-forward females with exaggerated features is unoriginal and nonprotectable); Williams & Chang, *supra* note 133, at B1.

²¹⁷ See *Aliotti*, 831 F.2d at 901 (finding no substantially similar expression when idea and its expression are inseparable); *Data E. USA*, 862 F.2d at 208 (holding that when idea and expression coincide, only identical copying will be protected against); cf. *Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003) (determining that realistic depictions of live animals are not protected).

²¹⁸ See *Apple Computer*, 35 F.3d at 1439 (indicating that when range of protectable and unauthorized expression is narrow, appropriate standard for illicit copying is virtually identical); *Aliotti*, 831 F.2d at 901 (holding that no substantial similarity may be found under intrinsic test where analytic dissection demonstrates that similarities in expression arise from use of common ideas); cf. Lunney, Jr., *Reexamining*, *supra* note 18, at 509 (indicating that no work is entirely new and authors will invariably reuse some existing elements).

²¹⁹ See *Mattel*, 616 F.3d at 915-16; *Bryant v. Mattel, Inc.*, No. 04-09049, 2008 U.S. Dist. LEXIS 63391, at *9-12 (C.D. Cal. July 24, 2008); Ward, *supra* note 202, at 2

concept of Bratz is particularized stylizations of human form and expression.²²⁰ However, Bryant's Bratz dolls were more than the result of narrow confines of available expressions in the fashion doll market.²²¹ Bratz represented a unique and total break from the traditionally restrictive range of accepted expressions in female fashion dolls.²²² Although female figures with exaggerated physical proportions are typical in the fashion doll market, the specifically particularized expression of Bratz moved beyond common expressions.²²³ For example, the unique distortion of figures and modern expression of youthful chic style presented a radically original expression of such ideas in doll form.²²⁴ These original ideas did not prevent other doll makers from making dolls with an attitude, however. Rather, MGA substantially copied the unique winning combination of Bratz dolls features.²²⁵ The Bratz dolls exemplified a unique expression; therefore, MGA violated Mattel's copyright under proper application of broad copyright protection.²²⁶ Furthermore, such

(arguing that perfecting doll's particularized face and expression is crucial to success in doll industry).

²²⁰ See Williams & Chang, *supra* note 133, at B1. *But see Satava*, 323 F.3d at 808 (indicating expressions that are standard, stock, or common to particular subject matter or medium are not protectable under copyright law); Dutra, *supra* note 48, at 419 (indicating that Mattel cannot claim monopoly over fashion dolls with bratty look or attitude, or sport trendy clothing because they are nonprotectable ideas).

²²¹ See Bryant, 2008 U.S. Dist. LEXIS 63391, at *9-12. *Compare Mattel*, 616 F.3d at 915 (holding that there is only limited range of expression for female fashion dolls), with Babbitt et al., *supra* note 83, at 1070-71 (discussing Second Circuit decision finding innumerable ways of making standard female fashion doll features original).

²²² See *Mattel*, 616 F.3d at 907; see e.g., Chang, *supra* note 134, at B1 (identifying Bratz as unique among Barbie's competitors); Williams & Chang, *supra* note 133, at B1 (indicating unique nature of Bratz as pouty plastic figures).

²²³ See *Mattel*, 616 F.3d at 907; cf. Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1163 (9th Cir. 1977) (finding that no work infringes upon another unless work invades original's expression); *id.* at 1170 (holding that marketplace of ideas not limited by copyright because copyright limited to protection of expression).

²²⁴ See *Mattel*, 616 F.3d at 907.

²²⁵ See, e.g., Babbitt et al., *supra* note 83, at 1070-71 (noting Second Circuit decision protecting doll features limited to copying particularized expression as features themselves belong to public domain). *But see Ets-Hokin v. Sky Spirits, Inc.*, 225 F.3d 1068, 1076 (9th Cir. 2000) (noting that *sine qua non* of copyrightability is originality; work must possess only minimal degree of creativity); Frybarger v. Int'l Bus. Machs. Corp., 812 F.2d 525, 529 (9th Cir. 1987) (finding that similarity between plaintiff and defendant's works must go beyond sharing abstract idea).

²²⁶ See *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994); *Data E. USA, Inc. v. EPYX, Inc.*, 862 F.2d 204, 208 (9th Cir. 1988); *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 901 (9th Cir. 1987).

extension of broad copyright protection meets the evolving realities of invention and the relationship between employers and creative employees.²²⁷

C. *Broad Copyright Protection Preserves Incentives for Companies to Hire and Retain Creative Individuals*

Two overarching policy objectives support a finding that MGA infringed Mattel's copyright in the Bratz dolls.²²⁸ First, cost-bearing corporations require greater copyright protection in employer-employee authorship disputes.²²⁹ Second, conceptions of authorship have progressed beyond Romantic notions of the eighteenth century individual author-genius that are at the heart of copyright law.²³⁰ The employer-employee relationship must reflect these changing attitudes and realities of creation, as well as business in modern society, where copyright and employment law converge.²³¹

Accordingly, courts must extend copyright protection provided to employers of creative individuals to reflect the reality of authorship in

²²⁷ See *infra* Part III.C (arguing for stronger application of work for hire doctrine in order to protect modern innovation).

²²⁸ See Birnhack, *supra* note 11, at 97 (arguing that current legal doctrine requires more solid basis for dealing with issue of ownership of employees' creative works); cf. Fisk, *Working Knowledge*, *supra* note 22, at 441 (noting that ownership of employee knowledge is now accepted part of our culture and economy); Wilf, *supra* note 20, at 140 (demonstrating how copyright law expanded during 1930s and 1940s in response to global economic crisis as well as social and cultural changes).

²²⁹ See Birnhack, *supra* note 11, at 129 (determining that basic bargain of employment relationship between employers and employees is shift of risks); cf. Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1349 (2004) (indicating that corporations use copyright as protection from flood of cheap, easy copies and dramatic increase in people who make copies). *But see* Fisk, *Working Knowledge*, *supra* note 22, at 443 (questioning what legitimate interest employers have in maintaining monopolistic control over knowledge).

²³⁰ See Mandel, *supra* note 107, at 319 (attributing Romantic concept of author-genius to Kant); cf. Wilf, *supra* note 20, at 190 (identifying shift in copyright law from Romantic image of author to regulation of competing interest in mass media and promoting interests of industrial economy); Cherensky, *supra* note 16, at 633-35 (using Lockean normative justification of employee-employer relationship and pre-assignment agreements in place of Romantic individual authorship).

²³¹ Cf. Lunney, Jr., *Copyright and Computer Programs*, *supra* note 13, at 2340 (arguing that potential deadweight loss should not alone justify limiting copyright protection); Paepke, *supra* note 173, at 55 (arguing that free enterprise no longer exists in market); Wilf, *supra* note 20, at 206 (discussing how modern intellectual property law remains shaped by New Deal paradigm classifying intellectual property as proprietary, monopolistic, and motor for entire domestic economy).

the twenty-first century.²³² The Copyright Act of 1976 presented a partial shift towards acknowledging the essential role that corporations play in the creative process.²³³ For example, the work for hire doctrine as defined by the Copyright Act granted automatic authorship of inventions to employers of creative employees, although with specific limitations.²³⁴ Further, the Copyright Act indicated a partial step towards granting greater authorship weight to corporations by protecting corporate copyright ownership.²³⁵ Companies provide the time, materials, and facilities for creative employees to create new inventions.²³⁶ These same corporations bear significant financial risk in fostering creativity, as acknowledged in the Copyright Act. They pay employees, develop infrastructure necessary for invention, and provide raw materials. Thus, courts should afford even greater weight to these risks in copyright disputes.²³⁷ Finally, without such considerations, risk-taking corporations may limit

²³² Cf. Birnhack, *supra* note 11, at 140 (determining that employer is in better position to undertake risks associated with producing work because typical production firm does not invest in one work only); Wilf, *supra* note 20, at 176 (arguing that history of American copyright law is comprised of conflicts between opposing economic groups). *But see* Lunney, Jr., *Reexamining*, *supra* note 18, at 488 (arguing that broadening copyright protection causes lost value for society as whole by restricting investment).

²³³ See 17 U.S.C. § 201 (2006); Kim, *supra* note 11, at 343; Wadley & Brown, *supra* note 12, at 33 (identifying one function of Copyright Act as attempt by Congress to integrate existing work for hire doctrine into copyright law).

²³⁴ See Kim, *supra* note 11, at 344; Loretto, *supra* note 14, at 716; cf. Wadley & Brown, *supra* note 12, at 36 (arguing that 17 U.S.C. § 201 supports work for hire doctrine application through affirmative rather than negative syllogism).

²³⁵ Cf. Birnhack, *supra* note 11, at 154-55 (indicating there is trade-off of risks between employer and employee; employee chooses not to be independent and to work for specific employer); Fisk, *Working Knowledge*, *supra* note 22, at 535 (arguing that modern intellectual property law provides for unprecedented formalization of corporate power over all aspects of employment and production); Kim, *supra* note 11, at 352 (arguing that absence of direct control does not mean inventor is not employee where other factors weigh in favor of finding employment relationship).

²³⁶ See Birnhack, *supra* note 11, at 156-57 (arguing that circumstances of employment convey clear indication to creative author that ownership lies with employer); cf. Fisk, *Credit Where It's Due*, *supra* note 105, at 60 (identifying corporations as most efficient allocator of rewards for innovation); Lemley & Reese, *supra* note 229, at 1373 (indicating that utilitarian function of copyright protection developed in response to corporate needs and costs).

²³⁷ Cf. Mandel, *supra* note 107, at 306 (noting that under economic concerns, law evolves towards efficiency and cost reduction); Paepke, *supra* note 173, at 55 (arguing that intellectual property protections should be strengthened in response to free riding and its negative effect on innovation); Sell, *supra* note 21, at 290 (identifying historic basis of intellectual property as business model for investment and production).

resources dedicated to innovation, which would severely stifle modern innovation.²³⁸

Today, the corporate inventor has largely replaced the individual author-genius of the eighteenth century.²³⁹ Risk-taking corporations provide employees with the tools necessary for innovation and invention.²⁴⁰ Employers compensate employees to create works in exchange for employment and assignments of authorship rights to the employer.²⁴¹ Thus, individuals and teams in creative corporate environments substantially replace the Romantic ideal of individual inventors toiling away in individual workshops.²⁴² The purpose of copyright law — to protect the original author of new innovations — must shift to encompass the evolving reality of corporate authorship.²⁴³

²³⁸ See Fisk, *Credit Where It's Due*, *supra* note 105, at 50-51; Paepke, *supra* note 173, at 60; *cf.* Mandel, *supra* note 107, at 352 (arguing that collaboration serves as valuable driver of creative achievement).

²³⁹ *Cf.* Lemley & Reese, *supra* note 229, at 1434 (arguing that Internet changed economics of copyright irretrievably); Woo, *supra* note 11, at 124 (arguing that authorship construct does not always reflect consequence of process of legitimizing economic interest among stakeholders). *But see* Cherenky, *supra* note 16, at 642 (arguing for continued application of personhood theory of property ownership in determining copyright ownership).

²⁴⁰ *Cf.* Birnhack, *supra* note 11, at 125 (requiring search for party who bears risk associated with making work, which in most cases is employer); Fisk, *Authors at Work*, *supra* note 136, at 4 (indicating that from economic perspective, ability of firm to obtain property rights in employee's creative products is efficient intellectual property regime). *But see* Sell, *supra* note 21, at 269 (arguing that copyright law should provide for natural rights in one's own creations).

²⁴¹ *Cf.* Birnhack, *supra* note 11, at 127 (noting that copyright does not guarantee success in market; investment and copyright protection do not alone guarantee success); *id.* at 128 (noting that there are two stages in life of work: creation and commercialization). *But see* Fisk, *Credit Where It's Due*, *supra* note 105, at 51 (arguing that intellectual property law does not adequately protect right of attribution to primary creators).

²⁴² *Cf.* Fisk, *Working Knowledge*, *supra* note 22, at 441 (noting that foundation of modern intellectual property law is corporate ownership of ideas that exist in minds of employees); Mandel, *supra* note 107, at 339 (arguing that artistic creation involves logical and externally focused objectives). *But see* Fisk, *Credit Where It's Due*, *supra* note 105, at 54 (indicating difficulty in comparing creative employees to functional employees).

²⁴³ See Wadley & Brown, *supra* note 12, at 32 (noting that Copyright Act assumes author is one who created work; individual from whose mind original work emanated); *cf.* Fisk, *Working Knowledge*, *supra* note 22, at 445-46 (noting gradual historical shift to recognizing knowledge as form of property belonging to someone other than employee); Mandel, *supra* note 107, at 342 (arguing that creativity almost always requires combination of people, innovation, and cognitive processes).

The Ninth Circuit in *Mattel* erred by addressing policy considerations under an outdated conception of authorship that ignores the changing dynamics of invention.²⁴⁴ In *Mattel*, the court should have interpreted copyright assignment more leniently to reflect *Mattel's* status as an employer of creative individuals.²⁴⁵ Just as modern corporations depend on innovation to survive, the expressions of ideas developed by creative employees must seamlessly transfer to employers.²⁴⁶ Thus, after considering the policy ramifications on copyright and employment law, *Mattel* rightfully owned the Bratz doll line developed by its creative employee.²⁴⁷

CONCLUSION

To establish copyright infringement, copyright owners must demonstrate ownership of the work, infringer access to the work, and substantial similarity to the copied work.²⁴⁸ *Mattel* satisfied all three requirements. Under the first requirement, *Mattel* owned the works of original expression produced by its employee through both express contract and the work for hire doctrine.²⁴⁹ The assignment from employee to employer and the incorrect finding of the Ninth Circuit reflects an increasingly tenuous grasp on outdated conceptions of

²⁴⁴ See *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 917-18 (9th Cir. 2010); cf. Lemley & Reese, *supra* note 229, at 1386 (noting that traditional copyright suits against direct infringers does not threaten technological innovation); Mandel, *supra* note 107, at 315-16 (arguing that social stereotypes of creativity present substantially inaccurate portrayals of actual modes of ingenuity).

²⁴⁵ See *Mattel*, 616 F.3d at 907; cf. Fisk, *Working Knowledge*, *supra* note 22, at 534 (indicating that intellectual property doctrines played significant role in enabling rise of corporate management of copyrights); Mandel, *supra* note 107, at 332 (arguing that courts pay too little attention to what experts know about how to actually promote creative process).

²⁴⁶ Cf. Fisk, *Credit Where It's Due*, *supra* note 105, at 50 (arguing that intellectual property law must evolve to meet transformation to knowledge economy); Mandel, *supra* note 107, at 335 (arguing that creativity requires divergent and convergent thinking); Sell, *supra* note 21, at 269 (indicating that copyright law is informed by competing perspectives on balancing public and private good).

²⁴⁷ Cf. Fisk, *Authors at Work*, *supra* note 136, at 3 (identifying trend among jurists criticizing legal emphasis on individual author as incorrectly exaggerated); Mandel, *supra* note 107, at 326 (noting that courts are incorrect to never perceive artistic creativity as expected). *But see* Lemley & Reese, *supra* note 229, at 1388 (arguing that threats of lawsuits against innovators is likely to deter innovation).

²⁴⁸ See sources cited *supra* note 141 (outlining three criteria plaintiff must prove for successful copyright suit).

²⁴⁹ See *supra* Part III.A (interpreting employment contract and analyzing application of work for hire doctrine).

authorship in American society.²⁵⁰ Corporations, rather than individuals, are increasingly the source of innovation and invention.²⁵¹ Under the second requirement, the infringer, MGA, clearly had access to Mattel's works because Bryant provided the Bratz doll sketches and sculpt for MGA's use.²⁵² Further, under the third requirement, Mattel enjoyed broad copyright protection under the substantially similar rather than virtually identical test.²⁵³ Thus, Mattel clearly supported its copyright claim against MGA.²⁵⁴

In *Mattel*, the Ninth Circuit incorrectly reversed the district court's assignment of broad copyright protection to works of expression properly owned by Mattel.²⁵⁵ First, the Ninth Circuit erred by assigning authorship of Bryant's works to MGA under either the express employment contract or the work for hire doctrine.²⁵⁶ Second, the Ninth Circuit erred by failing to analyze Mattel's ownership of Bratz as an original expression of an idea warranting review under the substantially similar test.²⁵⁷ Finally, the Ninth Circuit erred by

²⁵⁰ Cf. Wilf, *supra* note 20, at 205 (arguing that copyright shifted dramatically from nineteenth century antecedents rooted in literary property to vast array of twentieth century legal provisions). *But see* Fisk, *Authors at Work*, *supra* note 136, at 4 (criticizing Copyright Act as creating legal fiction of corporate ownership); Litman, *supra* note 24, at 1717 (arguing that in acquisitive society, drive for monopoly advantage is powerful pressure and, at its extreme, supports copyrighting alphabet).

²⁵¹ Cf. Fisk, *Working Knowledge*, *supra* note 22, at 59 (providing Kodak as example of corporation effectively utilizing increased intellectual property control); Hitchcock, *supra* note 170, at 233 (arguing that new market dynamics will continue to change manner in which businesses are structured and conducted); Wilf, *supra* note 20, at 140 (noting that New Deal initiated new expansive epoch in copyright law where products are viewed as essential instruments for industrial growth).

²⁵² See sources cited *supra* note 141 (indicating that second element of copyright infringement test is actual access to copied work).

²⁵³ See *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 913-14 (9th Cir. 2010); *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994); *Data E. USA, Inc. v. EPYX, Inc.*, 862 F.2d 204, 208 (9th Cir. 1988).

²⁵⁴ Cf. Wilf, *supra* note 20, at 143 (arguing that monopolistic view of copyright as proprietary interest necessary for economic development successfully supplanted older notions of copyright under common law). *But see* Fisk, *Credit Where It's Due*, *supra* note 105, at 58 (noting difficulty in preserving entrepreneurial spirit within constraints of bureaucratic work); Lunney, Jr., *Reexamining*, *supra* note 18, at 513 (arguing that broad application of copyright protection will have chilling effect on innovation).

²⁵⁵ See *Mattel*, 616 F.3d at 917-18; *supra* Part III.A-B (arguing that Mattel rightfully owned the works created by its employee and these works deserved broad copyright protection).

²⁵⁶ See *supra* Part III.A (arguing employment contract assigned Bratz to Mattel and that work for hire doctrine must be applied).

²⁵⁷ See *supra* Part III.B (arguing that Ninth Circuit incorrectly applied substantially

retrenching antiquated copyright policy, extending broad copyright protection to works by creative employees within companies.²⁵⁸ Based on the three factors of copyright infringement and the extension of broad rather than thin copyright protection, MGA violated Mattel's copyright of the Bratz doll line.²⁵⁹ Finding itself at the nexus of copyright and employment law, the Supreme Court should reverse the Ninth Circuit's *Mattel* decision and provide broad protection to employers.²⁶⁰

similar test rather than virtually identical test).

²⁵⁸ See *supra* Part III.C (indicating that policy considerations require greater respect for corporate ownership of employee-created works).

²⁵⁹ See *supra* Part III (arguing that Mattel owned the works created by its employee and these works require broad copyright protection); cf. Wadley & Brown, *supra* note 12, at 29 (indicating that purpose of copyright law is to provide incentive to creator to expend time and energy, with monopoly over subject matter).

²⁶⁰ Cf. Birnhack, *supra* note 11, at 99-105 (indicating inherent and unresolved tension when employment and copyright law come together); Mandel, *supra* note 107, at 301 (tracing confusion in copyright law to judicial and legislative misconceptions regarding modern creativity); Miller, *supra* note 50, at 466-67 (arguing for strengthening of copyright originality requirement to more closely reflect patent law).