Copyright Litigation: Analyzing Substantial Similarity

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A Practice Note discussing the significance of similarities and dissimilarities between works in copyright litigation. The Note explains how courts compare works for purposes of evaluating copyright infringement claims. Topics discussed include the elements of copyright infringement, actual copying, substantial similarity (infringing copying), analyzing substantial similarity for specific categories of works, evidentiary considerations and practical considerations for counseling on and litigating substantial similarity.

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Contents

Not all copying is actionable as copyright infringement. Even if copying is factually established, to prove infringement the copyright owner must also prove that the copying is legally actionable by showing that the two works are substantially similar. This Note discusses how substantial similarity is determined in copyright infringement litigation. Topics discussed include:

- The elements of copyright infringement.
- Actual copying versus infringing copying (substantial similarity).
- Tests for substantial similarity.
- Analyzing substantial similarity of specific categories of works.
- Evidentiary considerations.
- Analyzing substantial similarity pre-trial.
- Practical considerations for counseling on and litigating substantial similarity.

The Elements of Copyright Infringement

To prevail on a copyright infringement claim, a plaintiff generally must prove both that:

- The plaintiff owns a valid copyright in the work.
- The defendant wrongfully copied from the plaintiff's copyrighted work.

Identifying commonalities between the two works is not sufficient to prove the wrongful copying element. The plaintiff must prove both that:

- The defendant actually copied material from the plaintiff's copyrighted work (as opposed to creating it himself or copying it from another source).

- The defendant copied a substantial amount of copyrighted material from the plaintiff's work.

For more information on copyright infringement generally, see *Practice Note, Copyright Infringement Claims, Remedies and Defenses (www.practicallaw.com/3-517-6950)*.

Proof of Actual Copying

Proof that the defendant actually copied the plaintiff's work maybe either:

- Direct.
- Indirect.

Types of direct proof of actual copying include:

- Admissions.
- Eyewitness testimony.
- The presence of watermarks or other features in the defendant's work conclusively identifying the plaintiff's work.

Direct proof of actual copying is rare. Typically, a plaintiff must rely on indirect proof. Indirect proof generally consists of either:

- Striking similarity (see *Striking Similarity*).
- Access and probative similarity (see *Access and Probative Similarity*).

Striking Similarity

Striking similarity is similarity between the works that is either so comprehensive or so exact that it cannot be explained other than as a result of copying (see, for example *Selle v. Gibb, 741 F.2d 896, 904 (7th Cir. 1984)*). Striking similarity creates an inference of actual copying (see, for example, *Gaste v. Kaiserman, 863 F.2d 1061, 1068 (2d Cir. 1988)*). Most court decisions have held that if a plaintiff can show striking similarity it need not separately show that the defendant had access to the plaintiff's work to prove copying because the inference of access necessarily arises from the inference of copying (see, for example, *Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167 (7th Cir. 1997)*). However, the inference of copying created by striking similarity is rebuttable and must be reasonable in light of all other facts and circumstances (see, for example, *Gaste, 863 F.2d at 1068*). For example, the inference of copying would be rebutted despite a striking similarity between the two works if a defendant can prove that its work pre-dated the plaintiff's work. The assessment of

striking similarity is not limited to similarities between copyright-protected elements of the works.

Access and Probative Similarity

To prove actual copying based on access and probative similarity, it must be shown that:

- The defendant had access to the plaintiff's work when the defendant created his work (see *Access*).
- The similarities between the two works are probative of actual copying (see *Probative Similarity*).

Access

To prove access, the plaintiff need not establish conclusively that the defendant saw (or heard or otherwise perceived) the plaintiff's work. Only a reasonable possibility of access is required (*Gaste, 863 F.2d at 1066*).

Proof of a reasonable possibility of access includes:

- Proof of widespread dissemination of the plaintiff's work, for example, a number one song that the defendant may have heard almost anywhere at any time (see *ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 998 (2d. Cir. 1983)*).
- A proven link between the copyrighted work and the defendant, for example, if the plaintiff sent the work to the defendant for review (see *De Acosta v. Brown, 146 F.2d 408, 410 (2d. Cir. 1944)*).

Probative Similarity

Probative similarity can be any similarity that suggests copying but need not involve copyrighted expression (see, for example, *L.A. Printex Indus., Inc. v. Aeropostale, Inc., 676 F.3d 841, 851 (9th Cir. 2012)*, as amended on denial of reh'g and reh'g en banc (June 13, 2012)).

For example, probative similarity can consist of:

- Similar uses of public domain material.
- The defendant's inclusion of errors present in the plaintiff's work that would not be expected in the absence of copying.

Judicial opinions sometimes confusingly refer to a requirement that a plaintiff demonstrate access and substantial similarity to prove actual copying. However, the requirement that there be substantial similarity of copyrightable elements (see *Substantial Similarity (Infringing Copying)*) is

separate from the requirement of actual copying (see *Repp v. Weber, 132 F. 3d 882, 889 n.1 (2d Cir. 1997)*).

No bright line test exists to determine the quantity or quality of similarity that is probative of actual copying. Whether similarities are sufficient, when combined with evidence of access, to prove actual copying is determined on a case-by-case basis. Some courts have endorsed a sliding scale approach under which the stronger the evidence of access the less evidence of similarity will be required. This is called the inverse ratio rule (see, for example, *Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000)*).

Substantial Similarity (Infringing Copying)

Even if the defendant actually copied from the plaintiff's copyrighted work, for the copying to be actionable as infringement, it must include a significant amount of copyright-protected material (generally referred to as copyrightable material).

Courts have expressed the threshold of legal significance as a requirement that the defendant's work be substantially similar to the plaintiff's work. Substantial similarity is a conclusion that the amount of material copied is sufficient to warrant granting the plaintiff relief.

For purposes of evaluating substantial similarity in this context, courts consider only the quantity and quality of material copied that is copyrightable. The key considerations are:

- How much of the plaintiff's original material the defendant copied.
- How important the copied material is to the plaintiff's (not the defendant's) work.
- Whether copyright law protects the copied material.

Verbatim Copying and Total Concept and Feel

Copying that meets the requirement of substantial similarity can be either or both:

- **Verbatim copying.** The first and more obvious copying is verbatim copying. Infringement is likely if the defendant copied significant portions of the original material in the plaintiff's work verbatim (see, for example, *Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 980 (2d Cir. 1980)*).
- **Total concept and feel.** The second type is copying of a work's total concept and feel or overall look and feel. For example, infringement of a literary or audiovisual work can occur without verbatim copying if the infringer copies the entire backdrop, characters, inter-relationships, genre and plot design of the earlier work (see, for example, *TMTV Corp. v. Mass Prods., Inc., 645 F.3d 464, 470 (1st Cir. 2011)*).

The Amount of Copying Required

There is no bright line test, formula or rule for determining the line between infringing and non-infringing copying. As Learned Hand famously observed in *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*: "The test for infringement of a copyright is of necessity vague... Decisions must therefore inevitably be ad hoc" (*274 F.2d 487, 489 (2d Cir. 1960)*). The question in all cases is whether the material the defendant copied is a significant portion of the **plaintiff's** work, not the defendant's (see *Newton v. Diamond, 388 F.3d 1189, 1195 (9th Cir. 2004)*).

De Minimis Copying

When both the quantity and quality of the copied material are insignificant, courts typically find the copying *de minimis* and not infringing (see, for example, *Ringgold v. Black Entm't Television, Inc., 126 F. 3d 70, 74-77 (2d Cir. 1997)*). For example, a copyrighted work appearing only fleetingly as a background prop in a film may qualify as a *de minimis* use (see *Sandoval v. New Line Cinema Corp., 147 F.3d 215, 218 (2d Cir. 1998)*).

Courts have characterized the threshold between *de minimis* copying and infringement, called the *de minimis* threshold, as low. For copying to be considered *de minimis*, it must be so insignificant that it can be considered trivial (see *Sandoval, 147 F.3d at 218*).

Unprotected Material

Material that is not copyrightable is not considered in the substantial similarity analysis. Such material includes:

- Ideas.
- Facts.
- *Scènes à faire*, which is material that is commonly found in a work of a particular type (for example, the presence of castles, knights and dragons in a medieval story).
- Titles, cliches and slogans.
- Quotations.
- Elements found in nature, such as the physiognomy of plants and animals.
- Public domain material.

(See, for example, *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127, 132 (2d Cir. 2003).*)

For material to be copyrightable, it also must be original to the copyright owner and not copied from another party. If the material copied by the defendant is material that the plaintiff took (rightfully or wrongly) from a third party, the copying cannot be infringing (see, for example, *Tufenkian, 338 F.3d at 135*).

Dissimilarities

Dissimilarities in the material the plaintiff accuses the defendant of copying are significant because they mitigate any impression of similarity. The more differences between two works, the less likely it will appear that the defendant's was appropriated from the plaintiff's (see, for example, *Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905, 913 (2d Cir. 1980)*).

Dissimilarities in other aspects of the defendant's work, except to the extent those differences create an impression of a different overall concept and feel, typically are not significant. It does not matter if the alleged infringer adds significant material of its own to what the infringer copies from the plaintiff. As observed by Learned Hand, "no plagiarist can excuse his wrong by showing how much of his work he did not pirate" (*Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir. 1936)*).

Tests for Substantial Similarity

Courts employ different tests for assessing substantial similarity between two works:

- The ordinary observer and more discerning ordinary observer tests (see *The Ordinary Observer and More Discerning Ordinary Observer Tests*).
- The extrinsic/intrinsic test (see *The Extrinsic/Intrinsic Test*).
- The abstraction/filtration/comparison test (see *The Abstraction/Filtration/Comparison Test*).
- The intended audience test (see *The Intended Audience Test*).

For a listing of the substantial similarity tests used in each circuit, see *Substantial Similarity Tests by Circuit*.

The Ordinary Observer and More Discerning Ordinary Observer Tests

A plurality of circuit courts, including the Second Circuit, evaluate whether works are substantially similar using the ordinary observer test or, if some of the similarities involve unprotectable elements, the more discerning ordinary observer test. The First, Third, Fifth and Seventh Circuits apply these tests in various forms.

Under the ordinary observer test, the fact-finder examines whether the defendant:

- **Copied from the plaintiff.** To make this assessment, courts may allow:

- expert testimony concerning indicia of copying; and
- evidence of similarities concerning elements that may not be copyrightable.

(See, for example, *Segrets, Inc. v. Gillman Knitwear Co., Inc. 42 F. Supp. 2d 58, 74 (D. Mass. 1998).*)

- **Copied enough of the copyrightable elements of the plaintiff's work to create substantial similarity between the works.** Courts make this assessment using the ordinary observer test, which examines whether an ordinary observer would find the two works to have the same aesthetic appeal (see, for example, *Peter Pan Fabrics, Inc., 274 F.2d at 489*).

The more discerning ordinary observer test is designed for cases involving both copyrightable and non-copyrightable elements. The object of this test is to extract the non-copyrightable elements from the analysis. The analysis is whether an ordinary person would consider the aesthetic appeal of the works the same if that person:

- Ignored the copied portions that are unprotected by copyright.
- Considered only the copyrightable elements of the plaintiff's work copied by the defendant.

(See, for example, *Knitwaves v. Lollytogs Ltd., Inc., 71 F.3d 996, 1003 (2d Cir. 1995).*)

The Extrinsic/Intrinsic Test

The Ninth Circuit and several others evaluate substantial similarity using a combined extrinsic/intrinsic test.

The extrinsic test is objective and involves:

- Listing the elements of the two works.
- Comparing the list to assess any correlation of the elements.

(See, for example, *Shaw v. Lindheim, 919 F.2d 1362 (9th Cir. 1990).*)

If the extrinsic test reveals sufficient similarities between the works, the fact finder applies the intrinsic test which:

- Is subjective.
- Measures the visceral reaction of the lay observer.

(See *Shaw, 919 F.2d at 1358.*)

Copyright infringement is found if both the extrinsic and intrinsic tests favor the plaintiff. If either test favors the defendant, there is no infringement (see *Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042, 1045 (9th Cir. 1994)*).

The Abstraction/Filtration/Comparison Test

The Sixth, Tenth and District of Columbia circuits have adopted the abstraction/filtration/comparison test, originally created to evaluate computer software cases, for use in all cases. This test consists of three elements:

- **Abstraction.** In the abstraction segment, the court identifies the components of the plaintiff's work at various levels of detail, from the general idea to the precise words, images or sounds used in the work.

- **Filtration.** In the filtration segment, the court filters out uncopyrightable elements so all that remains to evaluate is the copyrightable materials.

- **Comparison.** In the comparison segment, the court compares the remaining copyrightable elements to the defendant's work. Infringement is found if the two are substantially similar.

(See, for example, *Country Kids 'N City Slicks v. Sheen, 77 F.3d 1280, 1285 (10th Cir. 1996).*)

The Intended Audience Test

The Fourth Circuit requires that the works be compared through the eyes of their intended audience (see *Dawson v. Hinshaw Music, Inc., 905 F.2d 731, 732-33 (4th Cir. 1990)*, cert. denied, *498 U.S. 981 (1990)*). In most cases, copyrighted works are intended for the public at large. Therefore, the intended audience and the ordinary observer are typically the same. However, in some cases, the works may be aimed at a narrower group, for example:

- Sophisticated consumers such as choral directors.

- Unsophisticated consumers such as children.

In these cases the court attempts to evaluate the works as if it were a member of the specialized group that is the intended audience for the work (see, for example, *Dawson, 905 F.2d at 733* and *Lyons P'ship L.P. v. Morris Costumes, Inc., 243 F.3d 789 (4th Cir. 2001)*).

Various questions about the intended audience test remain unanswered by the Fourth Circuit. Most significantly, the court has not specified how to determine the reaction of the intended audience.

Analyzing Substantial Similarity for Specific Categories of Works

While every copyright infringement case is unique, case law suggests elements that should be considered when evaluating the similarity of particular types of works including:

- Compilations and collective works (see *Compilations and Collective Works*).
- Computer programs and computer games (see *Computer Programs and Computer Games*).
- Derivative works (see *Derivative Works*).
- Fictional literary and dramatic works (see *Fictional Literary and Dramatic Works*).
- Motion pictures (see *Motion Pictures*).
- Music (see *Music*).
- Nonfiction (see *Nonfiction*).
- Visual Art (see *Visual Art*).
- Useful articles (see *Useful Articles*).

Compilations and Collective Works

Copyright in compilations, of which collective works are a subset, typically is limited to the selection, coordination and arrangement of elements, which are the focus of the comparison for evaluating similarities. The copyright in compilations is sometimes characterized as "thin" (see *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991)*). Therefore, the quantity of copying necessary to find infringement may be heightened in cases involving compilations. Factors that affect the scope of protection courts afford a particular compilation include:

- **The number of available options for presenting material.** The fewer the possibilities the less likely it is that a court would find substantial similarity based on both authors making the same choice out of a limited selection.
- **External factors.** These may include compatibility issues or industry conventions requiring that information be presented in a certain way.
- **Prior uses of similar selections or arrangements.** Prior uses suggest that the plaintiff's choices are common.

(See, for example, *Kregos v. Associated Press, 3 F.3d 656, 663 (2d Cir. 1993).*)

The term "selection" refers to the items selected for inclusion in the compilation. While courts consistently have held that quality can be as important or more important than quantity, comparison of the selection element typically focuses on the number or percentage of the plaintiff's selections that appear in the defendant's work (see, for example, *Key Publ'ns, Inc. v. Chinatown Today Publ'g Enters., Inc., 945 F.2d 509, 514 (2d Cir. 1991).*) The larger the percentage of identical items selected, the more likely infringement will be found, although there are no set percentages or overlap that is required. The quantity required may differ depending on how well concentrated the selections are in each work. Copying an entire block of the plaintiff's work may be considered substantial, but copying a similar percentage of material scattered throughout the plaintiff's work may not.

While separately identified as copyrightable elements, courts tend to merge coordination and arrangement into a single analysis of the manner of arrangement of the compiled materials. Unless dictated by convention or necessity, infringement is more likely if the works present data in similar order, using similar headings and other divisions. For example, in the case of a telephone book, a plaintiff is not likely to prevail by arguing that the defendant infringed by ordering the listings alphabetically.

Although not strictly compilations themselves, the copyrights in other types of works may be infringed by copying selection, coordination and arrangement. For example, in one case the plaintiff prevailed on its theory that the defendant copied the plaintiff's selection, coordination and arrangement of squirrel and leaf designs on a sweater (see *Knitwaves, Inc., 71 F.3d at 1004*).

In another case, the plaintiff survived summary judgment on its claim that the defendant copied its selection of baseball statistics for a baseball pitching form (see *Kregos, 937 F.2d at 703-07*).

Computer Programs and Computer Games

Computer programs and games often involve:

- An audiovisual component consisting of the sights and sounds displayed to the user.
- A literary component consisting of the code.
- Regarding computer games, story elements, such as plots and characters.

Copying any of these elements alone or in combination can give rise to infringement.

Courts analyze the visual and story components in the same manner as other audiovisual works by comparing:

- The visual display.
- Any sights and sounds.

- Any story elements.

(See, for example, *O.P. Solutions, Inc. v. Intellectual Prop. Network, Ltd., 96 CIV 7952 (LAP), 1999 WL 47191 (S.D.N.Y. Feb. 2, 1999).*)

Analyzing alleged copying of code can be more complex with infringement resulting from either:

- Verbatim copying.
- Copying the code's structure, sequence and organization.

(See, for example, *Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 701-02 (2d Cir. 1992).*)

Abstraction/Filtration/Comparison Test

Courts have developed a special test, the abstraction/filtration/comparison test for use in analyzing alleged copying of either:

- Code.
- The totality of a computer program.

In the abstraction portion of the test, the program is dissected into its component parts at the following levels:

- The program's:
  - main purpose; and
  - structure or architecture.
- Modules, algorithms and data structures.
- Source code.
- Object code.

(See, for example, *Gates Rubber Co. v. Bando Chem. Indus. Ltd., 9 F.3d 823, 835 (10th Cir. 1993).*)

In the filtration portion of the test, the court filters the various components to determine which portions of the program are copyrightable. The program's main purpose is generally not considered copyrightable because it is an idea, while its source code and object code generally are considered copyrightable unless they include material copied from others. Copyrightability of material in the

middle of the spectrum is variable. Elements filtered out of the analysis due to the absence of copyrightability include:

- Ideas.
- Elements that are part of or dictated by the process the computer is directed to perform.
- Elements dictated by efficiency concerns.
- Elements dictated by compatibility concerns.
- Elements dictated by industry standards.
- Elements that are public domain.
- Elements that are *scènes à faire*.
- Elements the plaintiff copied from other programs, particularly portions of code.

(See, for example, *Mitel, Inc. v. Iqtel, Inc. 124 F.3d 1366, 1375 (10th Cir. 1997)*.)

In the comparison portion of the test, the fact finder compares the protected elements that remain after filtration to analyze the similarities between the two (see, for example, *Computer Assocs., 982 F.2d at 710*).

Cases involving computer programs often also involve analysis of the two works as compilations. The selection, coordination and arrangement of screen displays or code sequences may need to be compared in any given case.

Courts admit expert testimony in computer cases more often than in other types of copyright cases:

- Typically in the abstraction and filtration stages (see, for example, *Gates Rubber, 9 F.3d at 835*).
- Sometimes in the comparison phase, if the court determines that the comparison may be unduly difficult for a layman (see, for example, *Computer Assocs., 982 F.2d at 713*).

Derivative Works

A derivative work copyright protects only the new material added by the second author, not any material that was part of the original work from which the second work was derived (*17 U.S.C. § 103*). Therefore, in cases involving the alleged copying of a derivative work, while the presence of material from the original work may in some instances prove copying of the derivative, it is not relevant to whether the derivative and the defendant's work are substantially similar (see

Theotokatos v. Sara Lee Pers. Prods., 971 F. Supp. 332, 341-43 (N.D. Ill. 1997)).

Sometimes whether the allegedly infringing work would qualify as a derivative work may be relevant, for example, if a licensee is authorized to reproduce or perform the original work but not to create a derivative. In this example, the parties must litigate the threshold issue of whether the changes the defendant made to the plaintiff's work would qualify the defendant's work as a derivative work under *17 U.S.C. § 101* (see, for example, *Mulcahy v. Cheetah Learning LLC, 386 F.3d 849, 853 (8th Cir. 2004)*).

Fictional Literary and Dramatic Works

Courts typically consider the following elements when assessing the substantial similarity in the context of works of fiction:

- Plot.
- Sequence of events.
- Characters.
- Mood.
- Theme.
- Pace.
- Dialog.
- Setting.

(See, for example, *Shaw v. Lindheim, 919 F.2d 1353, 1356-57 (9th Cir. 1990).*)

Of those elements, plot, characters and dialog are typically the most important (see, for example, *TMTV Corp. v. Mass Prods., Inc., 645 F.3d 464, 470-71 (1st Cir. 2011)*). As a practical matter, the analyses of plot and sequence of events overlap because it is often difficult to conceive of the plot without including the sequence of events. The other elements (mood, theme, setting and pace) tend to be unprotectable individually but can contribute to an overall impression of similarity or dissimilarity (see, for example, *Shaw, 919 F.2d at 1363.*)

Motion Pictures

Motion pictures can be considered as a combination of multiple works:

- A literary work encompassing the story elements.

- The cinematography and audio components that combine with the story to make the motion picture.

Copying of any of these elements alone or in combination can constitute infringement. Frequently only the story elements are at issue because the allegation is that the defendant copied a script or treatment submitted by the plaintiff.

When comparing the elements and components:

- The story elements are evaluated in the same manner as with a literary work (see *Fictional Literary and Dramatic Works*).
- The visual and audio components typically involve evaluation of:
  - the visual elements (see *Visual Art*); and
  - any musical or other author created sounds (see *Music*).

In motion picture cases, a combination of story elements and visuals are often the basis for the claim and the two must be analyzed together (see, for example, *New Line Cinema Corp. v. Bertlesman Music Grp., Inc., 693 F. Supp. 1517, 1522-23 (S.D.N.Y. 1988)*).

Music

Copyright in a musical composition can be infringed by the copying of:

- Musical elements (see *Musical Elements*).
- Lyrics (see *Lyrics*).
- Both musical elements and lyrics.

(See, for example, *Three Boys Music Corp., 212 F.3d at 485*, cert. denied, *531 U.S. 1126 (2001)*.)

Musical Elements

Courts have considered any commonly identified elements of music when comparing the two works, including:

- Melody.
- Harmony.

- Rhythm.
- Pitch.
- Tempo.
- Phrasing.
- Timbre.
- Tone.
- Spatial organization.
- Consonance.
- Dissonance.
- Accents.
- Bass lines.
- New technological sounds.
- Overall structure.

(See, for example, *Swirsky v. Carey, 376 F.3d 841, 849 (9th Cir. 2004).*)

Of those, melody, harmony and rhythm typically have been the most significant. In assessing the similarity of musical compositions, "performance elements" material added, omitted or changed by a performer, typically are excluded because they are not part of the composition.

Lyrics

Lyric comparison between two works typically involves simply reviewing the lyrics side-by-side to identify similarities. The comparison is complicated only if the similarities are:

- Limited particular phrases (which may be repeated), in which case the copyrightability and significance of the phrases must be addressed.
- Non-literal, for example, based on the songs telling similar stories.

Sound recordings

Copyright infringement cases involving the sound recording copyright (as opposed to copyright in the musical composition) primarily have involved the practice of sampling. Sampling is the copying of a portion of an existing recording and incorporating it in a new recording, often in a repetitive manner. The dispute in these cases typically involves the copyrightability and significance of the sampled material. The Sixth Circuit is the only circuit to have held that all sampling constitutes copyright infringement per se, regardless of the amount taken (see *Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 803-05 (6th Cir. 2005)*).

Use of Expert Testimony in Music Cases

More than perhaps any other subject matter except computer programs, courts in cases involving music tend to rely on expert testimony to:

- Identify similarities between the two works.
- Illustrate the works in a way that can be recognized by an untrained ear.

Experts often prepare graphics that illustrate the similarities between the works in a visual manner.

Practitioners confronting a copyright infringement case involving music should consider engaging an expert early to:

- Assist in identifying and evaluating the significance of any similarities.
- Identify the presence or absence of similar elements in other works that may have been the source of either the defendant's or plaintiff's inspiration.

Nonfiction

Nonfiction works include:

- News reports.
- Textbooks.
- Documentaries.

Facts are not copyrightable (see *Feist Publ'ns, Inc., 499 U.S. at 344*). Therefore, a defendant's use of facts included in the plaintiff's work is generally not relevant to the substantial similarity analysis. Because of the nature of nonfiction, the range of possible variation is more limited than it is with fiction. For that reason, courts have held that copyright infringement cases involving infringement of

nonfiction works require a higher threshold of copying. If an author deviates too far the truth can become distorted.

Copyright infringement cases involving nonfiction generally focus on:

- The manner of presentation of the facts.
- The ordering of events.
- The phrasing of the factual recitation.
- The selection of illustrations or examples.

(See, for example, *Nihon Keizai Shimbun v. Comline Bus. Data, Inc., 166 F.3d 65, 70-72 (2d Cir. 1999).*)

The selection of facts may be relevant in cases involving certain works, for example, a compilation (see *Compilations and Collective Works*).

Visual Art

Illustrations and Paintings

Courts comparing illustrations and paintings typically consider:

- Subject or scene.
- Pose.
- Shapes.
- Colors.
- Materials.
- Perspective.
- Style (for example, sketchy or whimsical).
- Definition (for example, soft, fuzzy or sharply defined).
- Lighting.

- Overall presentation and organization of images.

(See, for example, *Steinberg v. Columbia Pictures, Indus., Inc., 663 F. Supp. 706 (S.D.N.Y. 1987).*)

Depending on the facts, a particular element may be important or unimportant. In particular, subject matter alone is typically not significant. For example, the fact that two artists chose to paint a woman has little significance in assessing the actual similarity between the works.

Photographs

Photographs pose special challenges because a significant element of the photograph is often the capture of an object as it appeared at a moment in time without any influence by the photographer on the appearance of the object itself other than through the timing, lighting, definition and perspective employed. Courts often disregard similarities in elements that cannot be attributed to the photographer (as opposed to nature) (see, for example, *Harney v. Sony Pictures Television, Inc., No. 10-11181-RWZ 2011 WL 1811656, at *2 (D. Mass. May 12, 2011)*, aff'd, *704 F.3d 173, 181 (1st Cir. 2013).*) For example, the mere fact that two photographers took photos of the same object at nearly the same time alone does not make one an infringement of the other.

Useful Articles

Useful articles, for example, furniture and shoes, pose unique copyright challenges because the useful article itself is not copyrightable, but various design elements may be (for the definition of useful article, see *17 U.S.C. § 101*). The infringement analysis for useful articles involves first determining whether the design elements are integral to the article. For example, whether a shoe can still function as a shoe without the design elements in question. If the design elements are not separable there can be no copyright protection for them and no infringement. If the elements are separable, the work's utilitarian aspects must be eliminated from consideration. The focus of the analysis is on the similarities between the ornamental (creative) aspects of the works.

Separability

Separability is the most commonly litigated issue in infringement cases involving useful articles. Courts have split on whether the proper test is:

- Physical separability.
- Conceptual separability.
- Both physical and conceptual separability.

(See, for example, *Pivot Point Int'l, Inc. v. Charlene Prods., Inc., 372 F.3d 913, 922-23 (7th Cir. 2004).*)

Physical separability requires that the design elements be capable of physical separation from the useful article itself (see *Pivot Point Int'l, Inc., 372 F.3d at 922*). For example, the hood ornament of a Rolls Royce is physically separable from the automobile.

While courts have not agreed on a uniform definition, conceptual separability typically requires that one be able to imagine the design element separated from the useful portion (see *Pivot Point Int'l, Inc., 372 F.3d at 931*). For example, the intricate design on the back of a chair may be conceptually separable from the useful portion of the chair.

Evidentiary Considerations

Practitioners must take into account the type of evidence a court may or may not permit.

Expert Testimony

Courts may admit expert testimony in copyright infringement cases to identify:

- Signs of copying.
- Copyrightable material.

(See, for example, *McRae v. Smith, 968 F. Supp. 559, 566 (D. Colo. 1997).*)

Most reported decisions have not permitted experts to give opinions concerning whether the works are substantially similar. Exceptions typically occur in cases requiring specialized knowledge, for example, cases involving computer programs or music.

Lay Opinion

While there have been a few exceptions, courts typically do not allow lay opinion testimony concerning substantial similarity (see, for example, *Mihalek Corp. v. Michigan, 814 F.2d 290, 294 (6th Cir. 1987)*).

Surveys

Efforts to introduce survey evidence have generally been rejected in copyright infringement cases (see, for example, *Warner Bros., Inc. v. Amer. Broad. Cos., 654 F.2d 204, 244 (2d Cir. 1981)*). However, existing case law does not rule out the possibility of admitting survey evidence.

Analyzing Substantial Similarity Pre-trial

Depending on the nature of the claim, whether two works are substantially similar generally is described as either:

- A question of fact (see, for example, *Kepner-Tregoe, Inc. v. Leadership Software, Inc., 12 F.3d*

527, 533 (5th Cir. 1994), cert. denied, *513 U.S. 820 (1994)*).

- A mixed question of law and fact (see, for example, *Segrets, Inc. v. Gilliam Knitware Co., 207 F.3d 56, 64 (1st Cir. 2000)*, cert. denied, *531 U.S. 827 (2000)*).

In either case, the presence of factual issues typically makes it difficult for:

- A defendant to win on a motion to dismiss..
- Either party to win on a motion for summary judgment directed to the presence or absence of substantial similarity.

In courts applying the ordinary observer and abstraction/filtration comparison tests, summary judgment may be granted if the court finds that as a matter of law no reasonable jury could find either the presence or absence of substantial similarity (see, for example, *Warner Bros., 720 F.2d at 245*).

In courts applying the extrinsic/intrinsic test, the general rule is that if the plaintiff passes the extrinsic test, the application of the intrinsic test is a matter for the jury (see *Kouf, 16 F.3d 1042, 1045*).

Practical Considerations for Counseling On and Litigating Substantial Similarity

Practitioners assessing whether two works are substantially similar should conduct a thorough and rigorous analysis of the two works as soon as possible. This includes:

- Interviewing authors of the works (whichever ones are accessible).
- Identifying and creating a chart or list of the similarities and dissimilarities.
- Considering whether to engage an expert to assist in the comparison and identification of copyrightable material.
- Reviewing relevant case law, including case law pertaining to the types of works at issue and case law particular to the circuit in which the case is likely to be litigated, keeping in mind that the case law is unlikely to be dispositive, but may provide a sense of how a court may rule in a particular case.

Substantial Similarity Tests by Circuit

Circuit	Test	Representative Case
		Concrete Mach. Co. v. Classic

First	Ordinary observer	*Lawn Ornaments, Inc., 843 F.2d 600, 608 (1st Cir. 1998)*
Second	Ordinary observer	*Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960)*
Third	Ordinary observer	*Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904, 907 (3d Cir. 1975)*
Fourth	Intended audience	*Dawson v. Hinshaw Music Inc., 905 F.2d 731, 733 (4th Cir. 1990)*
Fifth	Ordinary observer	*Peel & Co., Inc. v. Rug Mkt., 238 F.3d 391, 398 (5th Cir. 2004)*
Sixth	Filtration/comparison	*Kohus v. Mariol, 328 F.3d 848, 854 (6th Cir. 2004)*
Seventh	Ordinary observer	*Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 614-15 (7th Cir. 1982)*
Eighth	Extrinsic/intrinsic	*Hartman v. Hallmark Cards, Inc., 833 F.2d 117, 120 (8th Cir. 1987)*
Ninth	Extrinsic/intrinsic	*Sid & Marty Krofft Television Prods. v. McDonald's Corp., 562 F.2d 1157, 1164 (9th Cir. 1977)*
Tenth	Abstraction/filtration/comparison	*Gates Rubber Co. v. Bando Chem. Indus., Ltd., 9 F.3d 823, 834 (10th Cir. 1993)*
Eleventh	Unsettled	*BUC Int'l Corp. v. Int'l Yacht Council Ltd., 489 F.3d 1129, 1148 (11th Cir. 2007)*
District of Columbia	Filtration/comparison	*Sturdza v. United Arab Emirates, 281 F.3d 1287, 1297 (D.C. Cir. 2002)*

Federal	Applies the test used by the circuit of the district court from which the appeal originated	*Hutchins v. Zoll Med. Corp., 492 F.3d 1377, 1383 (Fed. Cir. 2007)*

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