
SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW



PLI'S COMPLETE LIBRARY OF TREATISE TITLES

ART LAW

Art Law: The Guide for Collectors, Investors, Dealers & Artists

BANKING & COMMERCIAL LAW

Asset-Based Lending: A Practical Guide to Secured Financing
Documenting Secured Transactions: Effective Drafting and Litigation
Equipment Leasing–Leveraged Leasing
Hillman on Commercial Loan Documentation
Maritime Law Answer Book

BANKRUPTCY LAW

Bankruptcy Deskbook
Personal Bankruptcy Answer Book

BUSINESS, CORPORATE & SECURITIES LAW

Accountants' Liability
Anti-Money Laundering: A Practical Guide to Law and Compliance
Antitrust Law Answer Book
Broker-Dealer Regulation
Conducting Due Diligence in a Securities Offering
Consumer Financial Services Answer Book
Corporate Compliance Answer Book
Corporate Legal Departments: Practicing Law in a Corporation
Corporate Political Activities Deskbook
Corporate Whistleblowing in the Sarbanes-Oxley/Dodd-Frank Era
Covered Bonds Handbook
Cybersecurity: A Practical Guide to the Law of Cyber Risk
Derivatives Deskbook: Close-Out Netting, Risk Mitigation, Litigation
Deskbook on Internal Investigations, Corporate Compliance, and White Collar Issues
Directors' and Officers' Liability: Current Law, Recent Developments, Emerging Issues
Doing Business Under the Foreign Corrupt Practices Act
EPA Compliance and Enforcement Answer Book
Exempt and Hybrid Securities Offerings
Fashion Law and Business: Brands & Retailers
Financial Institutions Answer Book: Law, Governance, Compliance
Financial Product Fundamentals: Law, Business, Compliance
Financial Services Regulation Deskbook
Financially Distressed Companies Answer Book
Global Business Fraud and the Law: Preventing and Remediating Fraud and Corruption
Hedge Fund Regulation
Initial Public Offerings: A Practical Guide to Going Public
Insider Trading Law and Compliance Answer Book
Insurance and Investment Management M&A Deskbook
International Corporate Practice: A Practitioner's Guide to Global Success
Investment Adviser Regulation: A Step-by-Step Guide to Compliance and the Law
Life at the Center: Reflections on Fifty Years of Securities Regulation
Mergers, Acquisitions and Tender Offers: Law and Strategies
Mutual Funds and Exchange Traded Funds Regulation
Outsourcing: A Practical Guide to Law and Business
Privacy Law Answer Book
Private Equity Funds: Formation and Operation
Proskauer on Privacy: A Guide to Privacy and Data Security Law in the Information Age
Public Company Deskbook: Complying with Federal Governance & Disclosure Requirements
SEC Compliance and Enforcement Answer Book
Securities Investigations: Internal, Civil and Criminal
Securities Law and Practice Handbook

The Securities Law of Public Finance
Securities Litigation: A Practitioner's Guide
Social Media and the Law
Soderquist on Corporate Law and Practice
Sovereign Wealth Funds: A Legal, Tax and Economic Perspective
A Starter Guide to Doing Business in the United States
Technology Transactions: A Practical Guide to Drafting and Negotiating Commercial Agreements
Variable Annuities and Variable Life Insurance Regulation

COMMUNICATIONS LAW

Advertising and Commercial Speech: A First Amendment Guide
Sack on Defamation: Libel, Slander, and Related Problems
Telecommunications Law Answer Book

EMPLOYMENT LAW

Employment Law Yearbook
ERISA Benefits Litigation Answer Book
Labor Management Law Answer Book

ESTATE PLANNING AND ELDER LAW

Blattmachr on Income Taxation of Estates and Trusts
Estate Planning & Chapter 14: Understanding the Special Valuation Rules
International Tax & Estate Planning: A Practical Guide for Multinational Investors
Manning on Estate Planning
New York Elder Law
Stocker on Drawing Wills and Trusts

HEALTH LAW

FDA Deskbook: A Compliance and Enforcement Guide
Health Care Litigation and Risk Management Answer Book
Health Care Mergers and Acquisitions Answer Book
Medical Devices Law and Regulation Answer Book
Pharmaceutical Compliance and Enforcement Answer Book

IMMIGRATION LAW

Fragomen on Immigration Fundamentals: A Guide to Law and Practice

INSURANCE LAW

Business Liability Insurance Answer Book
Insurance Regulation Answer Book
Reinsurance Law

INTELLECTUAL PROPERTY LAW

Copyright Law: A Practitioner's Guide
Faber on Mechanics of Patent Claim Drafting
Federal Circuit Yearbook: Patent Law Developments in the Federal Circuit
How to Write a Patent Application
Intellectual Property Law Answer Book
Kane on Trademark Law: A Practitioner's Guide
Likelihood of Confusion in Trademark Law
Patent Claim Construction and *Markman* Hearings
Patent Law: A Practitioner's Guide
Patent Licensing and Selling: Strategy, Negotiation, Forms
Patent Litigation
Pharmaceutical and Biotech Patent Law
Post-Grant Proceedings Before the Patent Trial and Appeal Board
Substantial Similarity in Copyright Law
Trade Secrets: A Practitioner's Guide

LITIGATION

American Arbitration: Principles and Practice
Class Actions and Mass Torts Answer Book
Electronic Discovery Deskbook
Essential Trial Evidence: Brought to Life by Famous Trials, Films, and Fiction
Expert Witness Answer Book
Evidence in Negligence Cases
Federal Bail and Detention Handbook
How to Handle an Appeal
Medical Malpractice: Discovery and Trial
Product Liability Litigation: Current Law, Strategies and Best Practices
Sinclair on Federal Civil Practice
Trial Handbook

REAL ESTATE LAW

Commercial Ground Leases
Friedman on Contracts and Conveyances of Real Property
Friedman on Leases
Holtzschue on Real Estate Contracts and Closings: A Step-by-Step Guide to Buying and Selling Real Estate
Net Leases and Sale-Leasebacks

TAX LAW

The Circular 230 Deskbook: Related Penalties, Reportable Transactions, Working Forms
The Corporate Tax Practice Series: Strategies for Acquisitions, Dispositions, Spin-Offs, Joint Ventures, Financings, Reorganizations & Restructurings
Foreign Account Tax Compliance Act Answer Book
Internal Revenue Service Practice and Procedure Deskbook
International Tax & Estate Planning: A Practical Guide for Multinational Investors
International Tax Controversies: A Practical Guide
International Trade Law Answer Book: U.S. Customs Laws and Regulations
Langer on Practical International Tax Planning
The Partnership Tax Practice Series: Planning for Domestic and Foreign Partnerships, LLCs, Joint Ventures & Other Strategic Alliances
Private Clients Legal & Tax Planning Answer Book
Transfer Pricing Answer Book

GENERAL PRACTICE PAPERBACKS

Anatomy of a Mediation: A Dealmaker's Distinctive Approach to Resolving Dollar Disputes and Other Commercial Conflicts
Attorney-Client Privilege Answer Book
Drafting for Corporate Finance: Concepts, Deals, and Documents
Pro Bono Service by In-House Counsel: Strategies and Perspectives
Smart Negotiating: How to Make Good Deals in the Real World
Thinking Like a Writer: A Lawyer's Guide to Effective Writing & Editing
Working with Contracts: What Law School Doesn't Teach You

**Order now at www.pli.edu
Or call (800) 260-4754 Mon.–Fri., 9 a.m.–6 p.m.**

**Practising Law Institute
1177 Avenue of the Americas
New York, NY 10036**

When ordering, please use Priority Code NWS9-X.

SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW

**Robert C. Osterberg
Eric C. Osterberg**

Incorporating Release #14
May 2017
#205829

**Practising Law Institute
New York City
#631**

This work is designed to provide practical and useful information on the subject matter covered. However, it is sold with the understanding that neither the publisher nor the author is engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

QUESTIONS ABOUT THIS BOOK?

If you have questions about replacement pages, billing, or shipments, or would like information on our other products, please contact our **customer service department** at info@pli.edu or at (800) 260-4PLI.

For any other questions or suggestions about this book, contact PLI's **editorial department** at: plipress@pli.edu.

For general information about Practising Law Institute, please visit **www.pli.edu**.

Legal Editor: Keith Voelker

Copyright © 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017 by Eric C. Osterberg. All rights reserved. Printed in the United States of America. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of Practising Law Institute.

LCCN: 2003111375
ISBN: 978-1-4024-0341-5

*For Marion, Shelly, and Kelley,
who sacrificed the most so that we could write this book;
for Anna;
and for Lars, who, to his father's great joy,
looks just like his grandfather.*

About the Authors

ROBERT C. OSTERBERG is one of the top copyright litigators in the nation. He has been lead counsel in some of the best-known copyright infringement cases, including *Selle v. Gibb*, *Gilliam v. American Broadcasting Cos.*, *MCA, Inc. v. Wilson*, *Gaste v. Kaiserman*, and *Woods v. Bourne Co.* He has been counseling clients with respect to copyright matters for more than forty years and is the former senior partner of Abeles Clark & Osterberg in New York City. Robert was a panelist for PLI's Advanced Seminar on Copyright Law from 1992 through 2001 and an adjunct professor of copyright law at the law schools of Fordham University, St. John's University, and Roger Williams University. His publications include "The Use of Derivative Works After Copyright Termination—Does *Woods v. Bourne* Expose a Quagmire?," 43 J. COPYRIGHT SOC'Y 28 (1995).

Robert received his B.A. from Brandeis University and an LL.B. and LL.M. from New York University School of Law.

ERIC C. OSTERBERG is the founding member of Osterberg LLC in Boston, Massachusetts. He tries copyright, intellectual property, and general commercial litigation cases in the federal courts and counsels clients on copyright, trademark, trade secret, and false advertising issues. He writes and speaks regularly on copyright issues. Eric's speaking engagements include appearances before the New York chapter of the Copyright Society of the U.S.A., the Copyright Society of the South, and members of the New York State Bar Association. He serves on the Editorial Board of the *AIPLA Quarterly Journal* and served on the committee that wrote the model jury instructions for copyright infringement cases in the ABA's Model Jury Instructions: Copyright, Trademark and Trade Dress Litigation. Eric's publications include "Should Sound Recordings Really Be Treated Differently Than Other Copyrighted Works? The Illogic of *Bridgeport v. Dimension Films*," 53 J. COPYRIGHT SOC'Y 619 (2006) and "What Napster Means for Copyright Infringement," originally published in the ABA's Intellectual Property Law Newsletter (Spring 2001) and reprinted under the heading "The Best Articles Published by the ABA" in the ABA's GP Solo (March 2002).

SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW

Eric received his B.A. from Northwestern University and his J.D. from Emory University School of Law. He can be reached by email at eosterberg@osterbergllc.com and found on Twitter @OsterbergEric. His blog is Osterberg's Blog, <http://osterbergblog.typepad.com/blog>.

Table of Chapters

PART ONE:

The Nature of Substantial Similarity

- Chapter 1** **The Meaning and Significance of Substantial Similarity**
- Chapter 2** **Principles of Substantial Similarity**
- Chapter 3** **Tests for Substantial Similarity**

PART TWO:

Substantial Similarity and Specific Subject Matter

- Chapter 4** **Fictional Literary and Dramatic Works**
- Chapter 5** **Characters**
- Chapter 6** **Nonfiction**
- Chapter 7** **Audiovisual Works**
- Chapter 8** **Computer Programs**
- Chapter 9** **Musical Works and Sound Recordings**
- Chapter 10** **Works of Visual Art**
- Chapter 11** **Architectural Works**
- Chapter 12** **Choreography**
- Chapter 13** **Compilations and Collective Works**
- Chapter 14** **Works in Different Media and Different Formats**
- Chapter 15** **Derivative Works**
- Chapter 16** **Useful Articles**

**PART THREE:
Trial and Appeal**

Chapter 17 Selected Trial Issues

Chapter 18 Appellate Review

Table of Contents

About the Authors	ix
Table of Chapters	xi
Preface	xxi

PART ONE: The Nature of Substantial Similarity

Chapter 1 The Meaning and Significance of Substantial Similarity

§ 1:1	Substantial Similarity As an Element of Copyright Infringement.....	1-1
§ 1:2	Probative Similarity Distinguished.....	1-5
§ 1:3	Striking Similarity Distinguished.....	1-8

Chapter 2 Principles of Substantial Similarity

§ 2:1	<i>De Minimis</i> Threshold	2-2
§ 2:2	Similarities Must Be Found in Protected Material	2-5
§ 2:3	Unprotected Material.....	2-6
§ 2:3.1	Ideas	2-6
§ 2:3.2	Facts	2-11
§ 2:3.3	<i>Scènes à Faire</i>	2-12
§ 2:3.4	Clichés, Slogans, and Other Short Passages	2-15
§ 2:3.5	Uncopyrighted Copyrightable Materials	2-18
§ 2:3.6	Titles	2-19
§ 2:3.7	Quotations and Other Copied Material	2-20
§ 2:3.8	Elements Found in Nature	2-20
§ 2:4	Quantitative–Qualitative Standard.....	2-21
§ 2:5	Two Kinds of Similarities.....	2-24
§ 2:5.1	Verbatim Similarities and Paraphrases	2-25
§ 2:5.2	Total Concept and Feel	2-30
§ 2:6	Dissimilarities	2-36
§ 2:7	Intermediate Copying.....	2-38

Chapter 3 Tests for Substantial Similarity

§ 3:1 Ordinary Observer and More Discerning
 Ordinary Observer 3-3

§ 3:1.1 Second Circuit 3-3

[A] Ordinary Observer Test 3-4

[B] More Discerning Ordinary Observer
 Test 3-5

[C] The Sliding Scale of Access and Probative
 Similarity 3-7

[D] Summary Judgment, Motion to Dismiss, and
 Preliminary Injunction 3-8

§ 3:1.2 First Circuit 3-10

[A] Summary Judgment, Motion to Dismiss, and
 Preliminary Injunction 3-12

§ 3:1.3 Third Circuit 3-13

[A] Summary Judgment, Motion to Dismiss, and
 Preliminary Injunction 3-17

[B] Special Test for Complex Subjects Including
 Computer Programs 3-17

§ 3:1.4 Fifth Circuit 3-18

[A] Summary Judgment, Motion to Dismiss, and
 Preliminary Injunction 3-19

§ 3:1.5 Seventh Circuit 3-20

[A] The Role of Access and the Inverse
 Ratio Rule 3-22

[B] Summary Judgment, Motion to Dismiss, and
 Preliminary Injunction 3-23

§ 3:2 Extrinsic/Intrinsic Test 3-24

§ 3:2.1 Ninth Circuit 3-24

[A] Origin of the Extrinsic/Intrinsic Test 3-24

[B] Evolution of the Extrinsic/Intrinsic Test 3-25

[C] Analytic Dissection As Part of the
 Extrinsic Test 3-26

[D] Intermediate Steps Between *Krofft* and
Shaw 3-27

[E] The Role of Access and the Inverse Ratio
 Rule 3-28

Table of Contents

[F]	Summary Judgment Under the Extrinsic/Intrinsic Test	3-29
[G]	Preliminary Injunctions Under the Ninth Circuit Test	3-33
[H]	Difficulties in Applying the Extrinsic/Intrinsic Test	3-33
[I]	Motion to Dismiss	3-34
§ 3:2.2	Fourth Circuit.....	3-35
[A]	Intended Audience Test.....	3-36
[B]	Intended Audience in Computer Cases	3-38
[C]	Intended Audience for Works Marketed to Children.....	3-39
[D]	Intended Audience Versus Ordinary Observer.....	3-41
[E]	Advantages and Disadvantages of the Intended Audience Test.....	3-42
[F]	Summary Judgment, Motion to Dismiss, and Preliminary Injunction	3-42
§ 3:2.3	Eighth Circuit.....	3-43
[A]	Summary Judgment, Motion to Dismiss, and Preliminary Injunction	3-44
§ 3:3	Abstraction/Filtration/Comparison	3-45
§ 3:3.1	Tenth Circuit.....	3-45
[A]	Summary Judgment and Preliminary Injunction.....	3-49
§ 3:3.2	Sixth Circuit.....	3-50
[A]	Summary Judgment, Motion to Dismiss, and Preliminary Injunction	3-53
§ 3:3.3	D.C. Circuit	3-54
[A]	Summary Judgment, Motion to Dismiss, and Preliminary Injunction	3-55
§ 3:4	Eleventh Circuit.....	3-56
§ 3:4.1	Summary Judgment, Motion to Dismiss, and Preliminary Injunction	3-59
§ 3:5	Federal Circuit.....	3-60
§ 3:6	Preliminary Injunction Standards.....	3-60

PART TWO: Substantial Similarity and Specific Subject Matter

Chapter 4 Fictional Literary and Dramatic Works

§ 4:1	Unprotectable Elements	4-3
§ 4:2	Plot and Sequence of Events	4-4
§ 4:3	Dialogue.....	4-8
§ 4:4	Characters.....	4-9
§ 4:5	Theme	4-10
§ 4:6	Mood.....	4-11
§ 4:7	Setting.....	4-11
§ 4:8	Pace.....	4-12
§ 4:9	Total Concept and Feel.....	4-13

Chapter 5 Characters

§ 5:1	Character Copyrightability.....	5-1
§ 5:2	Visual Depictions Versus Descriptions	5-3
§ 5:3	Proper Test for Infringement.....	5-5
§ 5:4	Abstract Similarities Are Not Sufficient	5-7
§ 5:5	Dissection Is Improper.....	5-9
§ 5:6	Trivial Similarities Are Not Substantial Similarities	5-10
§ 5:7	Characters May Be Split or Combined	5-11

Chapter 6 Nonfiction

§ 6:1	Factual Works Generally	6-1
§ 6:2	Textbooks, Tests, and Other Educational Materials	6-4
§ 6:2.1	Textbooks	6-4
§ 6:2.2	Tests.....	6-5
§ 6:3	Docudramas and Other Fact-Based Works.....	6-7
§ 6:4	Television Game Shows and Other Unscripted Programs.....	6-8
§ 6:5	Reality Television	6-10

Table of Contents

Chapter 7 Audiovisual Works

§ 7:1 General Principles..... 7-1
§ 7:2 Similarities Among Story Elements 7-3
§ 7:3 Similarities Among Audiovisual Elements 7-5
§ 7:4 Similarities Among Both Story and
Audiovisual Elements..... 7-8

Chapter 8 Computer Programs

§ 8:1 Computer Programs: Literary and Audiovisual
Works 8-1
§ 8:2 Infringement of the Literary Work..... 8-2
§ 8:3 Infringement of the Audiovisual Work..... 8-3
§ 8:4 Infringement of the Compilation..... 8-4
§ 8:5 Test for Infringement: Abstraction/Filtration/
Comparison..... 8-6
 § 8:5.1 Abstraction 8-7
 § 8:5.2 Filtration 8-9
 [A] Distinguishing Between the Process and the
 Expression of the Process 8-11
 [B] Commands and Sequences: Process or
 Expression? 8-12
 [C] Idea-Expression Merger..... 8-13
 [D] Elements Dictated by Efficiency 8-14
 [E] Elements Dictated by Extrinsic Concerns..... 8-15
 [F] Public Domain and *Scènes à Faire* 8-16
 § 8:5.3 Comparison 8-18
§ 8:6 Third Circuit's *Whelan* Test..... 8-19
§ 8:7 Ordinary Observer Test and Computer Expert's
Role 8-20
§ 8:8 Intended Audience Test 8-22
§ 8:9 Applying Abstraction/Filtration/Comparison
to Other Types of Works 8-23
§ 8:10 Computer Games..... 8-23

Chapter 9 Musical Works and Sound Recordings

§ 9:1 Musical Works 9-2
 § 9:1.1 Lyrics 9-3
 § 9:1.2 Music..... 9-7

SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW

§ 9:2 Sound Recordings 9-14

§ 9:3 Sampling 9-15

 § 9:3.1 Is There a Need for Substantial Similarity in
 Sampling Cases? A Split Between the
 Ninth and Sixth Circuits 9-18

 [A] Sixth Circuit: *Bridgeport Music v. Dimension
 Films* 9-18

 [A][1] The Facts in *Bridgeport* 9-18

 [A][2] The District Court Opinion..... 9-19

 [A][3] The Sixth Circuit Opinion 9-20

 [A][3][a] The Reason Substantial Similarity Is
 Not a Requirement 9-21

 [A][3][b] The Reason the *De Minimis* Principle Does
 Not Apply 9-22

 [A][3][c] Other Factors Contributing to the Panel’s
 Decision..... 9-22

 [B] Ninth Circuit: *VMG Salsoul v. Ciccone* 9-24

 [C] Other Cases Concerning the Treatment of
 Sampling..... 9-24

 [C][1] Case Law Prior to *Bridgeport* 9-24

 [C][2] Other Sampling Cases Involving Substantial
 Similarity and *De Minimis* Principles 9-27

 [D] Statutory Construction 9-27

 [D][1] Significant History 9-27

 [D][2] The Relevant Provisions of the
 Copyright Act 9-29

 [D][2][a] Section 101 (17 U.S.C. § 101)..... 9-29

 [D][2][b] Section 102 (17 U.S.C. § 102)..... 9-31

 [D][2][c] Section 106 (17 U.S.C. § 106)..... 9-34

 [D][2][d] Section 114 (17 U.S.C. § 114)..... 9-35

 [D][3] Policy and Other Concerns 9-37

 [D][3][a] Perceived Benefit to the Music Industry..... 9-37

 [D][3][b] Effect on Creativity 9-38

 [D][3][c] Perceived Benefit to Musicians 9-38

 [D][3][d] Sampler Culpability 9-38

 [D][4] Fair Use Implications..... 9-39

Chapter 10 Works of Visual Art

§ 10:1 Photographs 10-1

§ 10:2 Illustrations and Paintings..... 10-11

Table of Contents

§ 10:3	Sculpture.....	10-16
§ 10:4	Jewelry	10-18
§ 10:5	Fabric, Carpet, and Wallcovering Designs.....	10-20
§ 10:5.1	Overall Appearance	10-22
§ 10:5.2	Individual Shapes and Items	10-23
§ 10:5.3	Layout	10-25
§ 10:5.4	Color.....	10-25
§ 10:5.5	Selection, Coordination, and Arrangement	10-26
§ 10:5.6	Proper Scrutiny.....	10-29
§ 10:6	Dolls.....	10-30
§ 10:7	Stuffed Animals	10-35
§ 10:8	Maps.....	10-40

Chapter 11 Architectural Works

§ 11:1	Generally.....	11-1
§ 11:2	Treatment of Specific Elements.....	11-8
§ 11:3	Limits on Protection of Architectural Works	11-11

Chapter 12 Choreography..... 12-1

Chapter 13 Compilations and Collective Works

§ 13:1	Definitions and Parameters of Protection.....	13-1
§ 13:2	“Narrowed” Substantial Similarity.....	13-3
§ 13:3	Selection	13-4
§ 13:4	Arrangement.....	13-8
§ 13:5	Computer Databases.....	13-10
§ 13:6	Short-Cut Proof.....	13-11
§ 13:7	Common Defenses.....	13-12
§ 13:8	Various Types of Compilations	13-12

Chapter 14 Works in Different Media and Different Formats..... 14-1

Chapter 15 Derivative Works

§ 15:1 Definition of Derivative Work 15-2
§ 15:2 Comparison of Accused Work to Derivative
Work..... 15-5
§ 15:3 Comparison of Accused Derivative Work to a
Preexisting Work 15-7

Chapter 16 Useful Articles 16-1

PART THREE: Trial and Appeal

Chapter 17 Selected Trial Issues

§ 17:1 Expert Opinion..... 17-1
§ 17:2 Lay Opinion and Audience Reaction..... 17-8
§ 17:3 Surveys..... 17-10
§ 17:4 Issue Preclusion..... 17-10
§ 17:5 Evidence of the Copyrighted Work..... 17-13

Chapter 18 Appellate Review 18-1

Appendix A Works Compared App. A-1

Appendix B Jury Instructions App. B-1

Table of Cases T-1

Defendant-Plaintiff Table DP-1

Index I-1

Preface

Substantial similarity is a sine qua non of every determination of copyright infringement. It is that part of an infringement claim that addresses the question: What constitutes wrongful copying? Yet, despite substantial similarity's importance in copyright infringement litigation, it remains one of the most elusive concepts in copyright law. Judge Learned Hand's pronouncement more than fifty years ago that substantial similarity decisions must "inevitably be ad hoc"¹ rings as true today as it did then. Part of the difficulty results from a lack of uniformity in judicial language addressing the subject. More confusion arises from the lack of a single substantial similarity test employed throughout the circuits. Added difficulty results from physical differences in copyrightable subject matter; materials as diverse as plays, music, computer programs, and literary characters cannot be compared in exactly the same way.

The purpose of this book is to present an organized approach to the analysis of substantial similarity, focusing on the key factors courts use to compare works in copyright infringement litigation. Chapter 1 focuses on substantial similarity as a concept and how it differs from probative similarity and striking similarity, two related but different principles. Chapter 2 distinguishes similarities that bear upon a finding of substantial similarity from similarities that must be disregarded. Chapter 3 addresses the circuit peculiarities in approach and language to allow the practitioner direct access to the guiding principles in each circuit.

Chapters 4 through 16 discuss substantial similarity with respect to various types of specific copyrightable subject matter, such as music, audiovisual works, books, and computer programs. The discussion in those chapters draws upon authorities from all circuits. Chapter 17 addresses the way substantial similarity is proved, including the role of expert testimony in the presentation

1. Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

of the proof. Chapter 18 discusses appellate review of district court substantial similarity determinations.

We have collected and included as appendices examples of the works at issue in certain cases discussed in the text and several examples of jury instructions that we hope practitioners will find useful.