

# Copyrights and Creative Copying

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# Copyrights and Creative Copying

Ann Bartow

## 1. INTRODUCTION

PEOPLE INVEST THEIR TIME, ENERGY AND RESOURCES to produce a broad variety of copyrightable works of original authorship for an expansive array of reasons, many of which appear economically irrational.<sup>1</sup> This makes it impossible to offer defensible generalizations about the effect, if any, that copyright laws have upon human creators, their artistic impulses, and the decision making underlying the formation of creative works. Nevertheless, it seems highly probable that authors can be negatively affected by the spectre of copyright infringement suits in a manner that burdens and chills the creative process. Exact, whole-text copying can be avoided by authors aspiring to copyright compliance, but inspirational, stylistic copying may be more difficult, and problematic, to elude. Many authors strive for unqualified uniqueness in their work for reasons generally unrelated to copyright, but may still unintentionally incorporate into their creative output elements of other works to which they have been exposed.<sup>2</sup> Some authors consciously reference other works, but if they undertake affirmative steps to acknowledge their influences and credit existing works for inspiration, they may

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1. See e.g. John Ruskin, *The Political Economy of Art* (New York: Wiley & Halsted, 1858). ("Believe me, no good work in this world was ever done for money.... A real painter will work for bread and water; and a bad painter will work badly, though you give him a palace to live in."); Daniel J. Boorstin, *The Creators* (New York: Random House, 1992) at 407–419; Anthony Storr, *The Dynamics of Creation* (New York: Atheneum, 1972) at 14–28, 61–74, 203–215.
  2. See e.g. Mihaly Csikszentmihalyi, *Creativity: Flow and the Psychology of Discovery and Invention* (New York: Harper Collins, 1996) at 1–21, 51–77, 107–127, 317–373; Marjorie Garber, "Our Genius Problem" *The Atlantic Monthly* (December 2002) 1, <<http://www.theatlantic.com/issues/2002/12/garber.htm>>; Malcolm Gladwell, "Group Think" *The New Yorker* (2 December 2002) 102; Howard Gardner, *Creating Minds* (New York: Basic Books, 1993) at 3–87; David Lamb, *Multiple Discovery: The Pattern of Scientific Progress* (Cambridge: Avebury, 1984) at 3–27, 131–143; Peter Whalley, "The Social Practice of Independent Inventing" (1991) 16:2 *Science, Technology, and Human Values* 208; Howard S. Becker, "Art as Collective Action" (1974) 39:6 *American Sociological Review* 767. See generally Richard Florida, *The Rise of the Creative Class: And How It's Transforming Work, Leisure, Community and Everyday Life* (New York: Basic Books, 2002); Malcolm Gladwell, *The Tipping Point: How Little Things Can Make a Big Difference* (Boston: Little, Brown, 2000); James Gleick, *Chaos: Making a New Science* (New York: Viking, 1987); Harrison C. White, *Canvasses and Careers: Institutional Change in the French Painting World*, with a new foreword and a new afterword (Chicago: University of Chicago Press, 1993).

actually increase the likelihood of being sued for copyright infringement. In both cases, copyright-related strategizing may unproductively deplete time, energy, and financial resources that might otherwise be used in creative endeavours.

Creating new works would appear less perilous, and be more effectively promoted, if the act of copying was less freighted with fear of copyright-infringement accusations. This essay considers just one fragment of this vast and complicated picture: the scope of the “substantial similarity” doctrine. Though judges sometimes do a good job of defining “substantial similarity” with appropriate narrowness, in other instances courts have found substantial similarity far too readily, fomenting unwarranted fear, uncertainty, and legal fees. The solution is simply more consistent judicial curtailment of the reach of copyright infringement liability grounded in substantial similarity, whether in the context of copyright holders’ reproduction rights, or derivative works rights.

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## 2. IMITATION AS THE SINCEREST FORM OF FELONY<sup>3</sup>

AUTHORS AND PROSPECTIVE AUTHORS who follow copyright issues through reports in the mainstream media are likely to understand that large-scale content owners strenuously object to having their works copied or used in unauthorized ways. The many high profile copyright cases pertaining to acts of literal copying, such as those involving file sharing technologies and the downloading of entire songs and movies, have made this abundantly clear to everyone. Large-scale copyright holders have invested tremendous resources in convincing the courts and the public that literal copying is theft.

Other copyright disputes arise when a content owner alleges that one work is too similar to another in which she holds a copyright. Consumers may not follow mainstream media accounts of these suits closely if they do not typically produce creative works they intend to exploit commercially. Authors who recognize the potential importance of copyright issues to their own livelihoods, on the other hand, likely do pay attention to these cases. The prospect that creating breakthrough commercially-successful works will incite rampant copyright litigation may send talented but starving artists off in search of dental school applications.

The legacy of some substantial similarity copyright infringement litigation is a termination of, or encumbrance upon, the distribution of certain individual works: those found to be infringingly similar to others, and those created or held by individuals lacking the will or the money to defend against copyright infringement allegations. When such suits are widely publicized, the creation of entire categories of works may be chilled and discouraged. Consider the following: When ABC decided to develop a miniseries on the life of Anne Frank, the

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3. This is somewhat of an exaggeration, at least as of this writing. For excellent accounts of copyright criminality, see: Lydia Pallas Loren, “Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement” (1999) 77:3 Wash. U.L.Q. 835; Stuart P. Green, “Plagiarism and the Limits of Theft Law: Some Preliminary Thoughts on Norms and the Criminalization of Intellectual Property Law,” (2002) 54 Hastings L.J. 167 at 241 (stating that criminal penalties for violation of intellectual property rights seem out of place); Geraldine Szott Moohr, “The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory” (2003) 83 B.U.L. Rev. 731.

company was unable to obtain the rights to her diary and received litigation threats that caused ABC to direct the project's creative team to draft a script that did not use a single word of Anne Frank's writing.<sup>4</sup> Lines were changed to avoid even coincidental similarity to words from her diary,<sup>5</sup> and a writer was kept on the set during the entire shoot to police last-minute script changes.<sup>6</sup> Even then, the Anne Frank-Fonds, a foundation that holds the copyrights in the diary, denounced perceived "substantial similarity between the two works" and threatened legal action.<sup>7</sup> The miniseries had to be constructed so that it avoided not only the copyrighted words of the diary, but also all of the copyrighted expressions contained in previous books, films, television movies, plays and documentaries about Anne Frank.<sup>8</sup> One shudders to think of the original distinguishing narrative devices the creative geniuses at ABC or its parent company, Disney, may have contemplated, such as the addition of cartoon characters singing or wisecracking about the Holocaust, perhaps leading inexorably to an Anne Frank Happy Meal at McDonald's.<sup>9</sup>

The television network CBS recently sued, so far unsuccessfully, to stop competitor ABC from broadcasting a series entitled, "I'm a Celebrity, Get Me Out of Here," asserting that the show infringed copyrighted elements of the CBS series "Survivor."<sup>10</sup> While one could certainly argue that society would benefit

4. Elizabeth Jensen "Beyond the Attic: A Miniseries Trying to Paint a Fuller Portrait of Anne Frank Has Touched A Sensitive Spot in Those Who Protect Her Memory" *Los Angeles Times* (29 April 2001) 8.

5. Anne Frank herself borrowed words from others. As David Lange reports:

In his provocative essay on fair use included among the papers in this symposium, David Nimmer publishes for the first time the contents of a poem written by Anne Frank in 1940 to a friend whose birthday party in Amsterdam young Anne attended, perhaps for the last time. "Dear Henny," Anne Frank wrote on that occasion, "Pluck roses on earth, and forget me not." The words are haunting now, poignant, simple, terribly sweet and sad. They call to us from across the years with a power they surely could not have possessed when first they were penned. Yet I would have said they were unmistakably creative then. Who today would deny that they are imagination exemplified?

But I am obliged to report—on the authority of David Nimmer himself, who discovered what I am about to relate after his own article had gone to press—that these words also appear to have been appropriated verbatim from an anthology of poems widely available in The Netherlands at the time. The poet who wrote them was named Snelders. His work appears to have been composed in 1895, and might plausibly have remained under copyright in 1940. Was Anne Frank a creator on the occasion when she wrote her note to Henny? I have said I think so, and my opinion remains unchanged. But was she an author? Perhaps not, in the conventional understanding of that term in copyright. Was she a plagiarist, a pirate, a thief? No decent person would lay such a charge against her memory. She was just a young girl, barely ten years old, a friend writing to a friend on the occasion of a celebration. Presupposing copyright, was this fair use? Yes, surely then—and even now, under the tedious and inexact standards of our time. But I submit that these are the wrong questions, and not merely for obvious reasons of decency. The questions are wrong because, coming as they do from within the matrix of copyright, they are motivated by the wrong priorities and the wrong concerns.

David Lange, "Reimagining the Public Domain" (2003) 66 *Law & Contemp. Prob.* 463 at 482.

6. *Ibid.*

7. *Ibid.*

8. Jensen, *supra* note 4. (Works about Anne Frank include a 1955 Pulitzer Prize-winning play, a 1959 film starring Milli Perkins, a 1980 television movie starring Melissa Gilbert, a 1988 television movie starring Mary Steenburgen called "The Hiding of Anne Frank," a 1995 documentary called "Anne Frank Remembered," and an animated film that came out in 1999.)

9. Disney is the defendant in a copyright suit that was launched when a French author, who penned a book about a clown fish well before the movie "Finding Nemo" was released, discovered that a bookstore chain removed his book from their shelves because it was too similar to Disney books based on "Finding Nemo." See Lia Haberman, "French Author Finds 'Nemo' Fishy" *Yahoo! News* (6 January 2004), <[http://story.news.yahoo.com/news?tmpl=story&u=/eo/20040106/en\\_movies\\_eo/13223](http://story.news.yahoo.com/news?tmpl=story&u=/eo/20040106/en_movies_eo/13223)> and Shiraz Sidhva, "French Author Claims 'Finding Nemo' Plagiarism" *Yahoo! News* (30 December 2003), <[http://story.news.yahoo.com/news?tmpl=story&u=/nm/20031230/film\\_nm/film\\_nemo\\_dc\\_1](http://story.news.yahoo.com/news?tmpl=story&u=/nm/20031230/film_nm/film_nemo_dc_1)>.

10. See e.g. Reuters, *New York Times* (14 January 2003), section C at 12, col. 3 (reporting the denial of CBS's request for injunctive relief).

more from a dramatic retelling of the Anne Frank story than it does from “I’m a Celebrity, Get Me Out of Here,” both creative ventures are demonstrably vulnerable to copyright-related restraints. It is only because ABC was willing to invest substantial resources in defending copyright disputes that the projects were able to move forward. These are happy ending stories, because ABC ultimately prevailed in its efforts to complete and distribute new creative works, but the possibility of additional legal action remains. Lone individuals or entities without the resources of ABC might have caved beneath the silencing pressure that copyright laws facilitated.

### 2.1. The Legal Framework

Aspiring authors who are deeply impressed either by the contents of a novel, or by the profits it earns, may seek to emulate its plot points, themes and character development in their own creative works. At some threshold of partial, inexact copying, such imitation ceases to be the sincerest form of flattery to the novel’s copyright owner and begins to resemble actionable infringement. Judges and juries, when acting as fact-finders in litigated copyright disputes, are compelled to decide when an author has “taken too much” from a copyrighted work owned by another. This challenge arises only when an author so accused decides to contest an infringement allegation, rather than capitulate to any demands asserted by the copyright owners to avoid the risks and expenses of defending a lawsuit in federal court.

Chapter One of the U.S. *Copyright Act* is entitled “Subject Matter and Scope of Copyright,”<sup>11</sup> and section 102 states in pertinent part that copyright protection subsists in original works of authorship in eight categories: literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.<sup>12</sup> The *WIPO Copyright Treaty* uses similar language, stating: “[C]opyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.”<sup>13</sup> There are three distinct modes of copying-related copyright protections available for these broad categories of works. The first is related to literal or exact copying and balances the intellectual property rights of the copyright owner against societal rights of access and fair use. The second is concerned with enabling other authors to learn from and become inspired by existing copyrighted works, while simultaneously discouraging them from producing works that are substantially similar. The third is related to protection from copying in the form of unauthorized derivative works,<sup>14</sup> which typically implicates some literal

11. *Copyright Act of 1976*, U.S. Code Title 17, §§ 101-122. The entire *Copyright Act* extends through Section 803 of Title 17 [*Copyright Act*].

12. *Ibid.* § 102.

13. World Intellectual Property Organization, Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva (December 2-20 1996). *WIPO Copyright Treaty*, 20 December 1996 36 I.L.M. 65, adopted by the Diplomatic Conference on December 20, 1996. Article 2, Scope of Copyright Protection: “Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.” See e.g. <<http://www.wipo.org/eng/diplconf/distrib/94dc.htm>>.

14. The allocation and maintenance of monopoly rights in characters, specific images, and other attributes of creative works that can be at issue in derivative works disputes are also subject to the oversight and ministrations of other legal regimes such as the *Lanham Act*, 15 U.S.C. (1946).

copying,<sup>15</sup> but is sometimes invoked as an adjunct or homologue to substantial similarity allegations pertaining to a copyright holder's exclusive right to reproduce a work.<sup>16</sup> In non-literal copying cases in which violations of derivative works rights are alleged, the test employed by the court is often characterized as the substantial similarity test.<sup>17</sup>

One way to clean up the ambiguities of the substantial similarity doctrine would be to abolish it altogether in the context of non-literal violations of the reproduction right,<sup>18</sup> allowing copyright infringement suits only where literal copying or the creation of unauthorized derivative works<sup>19</sup> could supportably be alleged. The judicial response, however, might be to expand improperly the definition of derivative works to accommodate litigation of the very same disputes.<sup>20</sup>

The term "substantial similarity" itself causes confusion because the same term is sometimes employed for two distinct purposes at two different points in copyright infringement legal analysis. To prove infringement, a plaintiff must show, first, that the defendant actually copied the plaintiff's work, and second, that copied elements were comprised of protected expression and sufficiently quantitatively and qualitatively important to constitute actionable infringement.<sup>21</sup> Actual copying is established by showing both access to the work and substantial similarity, meaning that the plaintiff and defendant works are sufficiently similar to support a conclusion that the defendant actually copied from the plaintiff.<sup>22</sup> The second prong of the infringement test also involves a showing of substantial similarity, but in this context requires demonstrating that the defendant copied a substantial amount of copyright-protected expression.<sup>23</sup> To

15. This literal copying may be of characters and images rather than of a story line, as in *Micro Star v. Formgen Inc.*, 154 F.3d 1107 (9th Cir. 1998), in which the court concluded that new Duke Nukem 3D game levels were sequels to the story of the game, and therefore unauthorized derivative works.
16. See e.g. *Horgan v. Macmillan, Inc.*, 789 F.2d 157 (2nd Cir. 1986). A third category of derivative works disputes place derivative works rights in tension with the first sale doctrine of section 109(a) of the *Copyright Act of 1976*, as they involve the re-use of physical embodiments of creative works that were lawfully purchased. See e.g. *Mirage Editions v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988); *Munoz v. Albuquerque A.R.T. Co.*, 829 F.Supp. 309 (D. Alaska 1993), *aff'd*, 38 F.3d 1218 (9th Cir. 1994); *Greenwich Workshop v. Timber Creations*, 932 F.Supp. 1210 (C.D. Cal. 1996); and *Lee v. A.R.T. Co.*, 125 F.3d 580 (7th Cir. 1997).
17. See e.g. Lydia Pallas Loren, "The Changing Nature of Derivative Works in the Face of New Technologies" 4 *J. Small & Emerging Bus. L.* 57 at 62–63 ("Recognizing that almost all works are, in a broad sense, based on preexisting works, courts have attempted to confine the application of the derivative work right through limiting doctrines, including requiring the work either to be substantially similar to the copyrighted work or to substantially incorporate protectable material from the underlying work."); Michael Wurzer, "Note: Infringement of the Exclusive Right to Prepare Derivative Works: Reducing Uncertainty" (1989) 73 *Minn. L. Rev.* 1521.
18. *Copyright Act*, *supra* note 11 at § 106 (1).
19. *Ibid.* at § 106 (2).
20. See generally Glynn S. Lunney, Jr., "Reexamining Copyright's Incentives-Access Paradigm" (1996) 49:3 *Vand. L. Rev.* 483 (argues in favour of imposing a standard of infringement that would require the copyright owner to show exact or nearly exact duplication of the underlying work); Mark A. Lemley, "The Economics of Improvement in Intellectual Property Law" (1997) 75 *Tex. L. Rev.* 989 (argues that expanded copyright protection undermines the public interest in the progress of science and the useful arts by placing obstacles in front of those seeking to create new works); Stewart E. Sterk, "Rhetoric and Reality in Copyright Law" (1996) 94 *Mich. L. Rev.* 1197 at 1197–1204 (argues that the optimal copyright system would not seek to maximize the number of works created, but, in recognition of the costs of copyright, would withhold protection even when marginally more protection would result in a marginal increase in creative activity).
21. See e.g. Craig Joyce et al., *Copyright Law*, 5th ed. (New York: Matthew Bender, 2000) at 690–692, 697–700, 705–714.
22. *Ibid.*
23. *Ibid.* "Substantial" can be either quantitative or qualitative. See e.g. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

prevent the confusion inevitably fostered by the use of the same term for two different purposes, some courts have suggested using “probative or factual similarity” as the term denoting the threshold for actual copying, and reserving “substantial or legal similarity” to connote the threshold for infringement.<sup>24</sup>

Copyright scholar Alan Latman laid out the elements of substantial similarity premised copyright infringement as follows:

(1) The defendant must have seen or heard the plaintiff’s work at some time prior to creating his or her own work *and* have used plaintiff’s work in some fashion as a model. Thus, “copying” in the first instance is the obverse of independent creation.

(2) The material copied by defendant from plaintiff’s work must be such as enjoys protection under copyright. Thus, if all defendant copied from plaintiff’s work was a report originally issued by the Department of Defense, such material is excluded by the statute from copyright protection, and defendant will not be held to have infringed. This requirement illustrates the correlation between questions of copyrightability and infringement: defendant’s taking of uncopyrightable material from plaintiff’s work does not infringe.

(3) Not only must defendant copy, rather than independently create, and not only must he or she copy protected material, but also such protected material must be “substantial.” Thus, to satisfy this requirement, plaintiff would have to show a substantial degree or order of similarity or “substantial similarity” between the works of plaintiff and defendant.<sup>25</sup>

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24. See e.g. *Repp v. Webber*, 132 F.3d 882 at 889 (2nd Cir. 1997).

25. Alan Latman, “‘Probative Similarity’ As Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement” (1990) 90:5 Colum. L. Rev. 1187 at 1189. In *Dean Preston v. 20th Century Fox Canada Limited et al.*, (1990) 38 F.T.R. 183, 33 C.P.R. (3d) 242, MacKay J., in the context of a claim of copyright infringement against 20th Century Fox, George Lucas and Lucas Films Ltd., expressed approval for the substantial similarity test articulated by the Ninth Circuit Court of Appeals in *Sid & Marty Krofft Television Productions, Inc. v. McDonald’s Corp.*, 562 F.2d 1157 at 1164 (9th Cir. 1977), and by the Southern District of New York in *Bevan v. Columbia Broadcasting System Inc.*, 329 F.Supp. 601 at 605 (S.D.N.Y. 1971). In accordance with the test enunciated in these cases, MacKay J. concluded that the trier of fact should assess substantial similarity by looking at a number of factors, including plot, themes, dialogue, mood, setting or scenes, pace, sequence and characters, all “within the recognized limit of copyright in the protected work,” and then by asking “whether the average lay observer...for whom the work is intended, would recognize the alleged copy as having been appropriated from the copyrighted work.”

Alan Latman was never, to my knowledge, characterized during his lifetime as an information-wants-to-be-free type of copyright communist.<sup>26</sup> His scholarship generally reflects a belief in the importance of strong copyright protections.<sup>27</sup> The rather stringent substantial similarity test that he articulated reflects what he conceived of as a distillation of copyright best practices culled from case law. He correctly recognized that the benefits and burdens of the substantial similarity doctrine were very different from those related to literal copying, and appropriately portrayed a copyright holder's burden of proof when alleging infringement through substantial similarity as a heavy one. Unlike the plausible effects of literal copying, a second work that simply borrows from or builds on another is unlikely to serve as a market substitute for the original. Instead, the question a substantial similarity dispute typically raises is whether a second author had (but flouted) a copyright-imposed obligation to ask permission from, and remit licensing fees to, the author of a pre-existing work. To impose this duty too lightly, however, is to silence and censor new works with no corresponding public benefit.

If little similarity exists between the copyrightable elements of two works, no amount of evidence of access will suffice to prove copying.<sup>28</sup> Conversely, despite there being no evidence of access, if there are striking similarities between the copyrightable elements of works, the possibility of independent creation becomes improbable, and access by the defendant to the plaintiff's work may be inferred.<sup>29</sup> However, proof of actual access or strong likelihood of access to copyrighted works increases exposure to liability for copyright infringement. As a result, the interests of creative people are somewhat compromised by the voluminous flow of information facilitated by the internet. This is because if access to a work is proven or demonstrably likely, the degree

26. See e.g. John Perry Barlow, "The Economy of Ideas" *Wired* 2:3 (March 1994), <[http://www.wired.com/wired/archive/2.03/economy.ideas\\_pr.html](http://www.wired.com/wired/archive/2.03/economy.ideas_pr.html)>.

The way in which information spreads is also very different from the distribution of physical goods. It moves more like something from nature than from a factory. It can concatenate like falling dominos or grow in the usual fractal lattice, like frost spreading on a window, but it cannot be shipped around like widgets, except to the extent that it can be contained in them. It doesn't simply move on; it leaves a trail everywhere it's been. The central economic distinction between information and physical property is that information can be transferred without leaving the possession of the original owner. If I sell you my horse, I can't ride him after that. If I sell you what I know, we both know it.

See also Peter Givler, "Copyright: It's for the Public Good," *Chronicle for Higher Education* (September 2003), <<http://chronicle.com/weekly/v49/i35/35b02001.htm>> (access restricted to subscribers).

The academics I know are smart, interesting, delightful people, most of them, but they do have one raffish eccentricity: their wonderful eagerness to have opinions about anything. Take their current arguments about copyright. To hear them tell it, copyright is a law invented by publishers solely to serve their own financial interests, a personal-use exemption to copyright law exists for the convenience of scholars, and any educational use of copyrighted material is, by definition, a fair use. And the most pernicious of all: Copyright and intellectual freedom are fundamentally opposed, locked, like good and evil, in a Manichaean struggle for the soul of the university.

27. See e.g. Alan Latman, Robert A. Gorman & Jane Ginsburg, *Copyright for the Nineties: Cases and Materials*, 3d ed. (Charlottesville: Michie, Bobbs-Merrill, 1989); Alan Latman, "Fair Use of Copyrighted Works" (1958), reprinted as Study No. 14 in *Copyright Law Revision Studies* Nos. 14–16, prepared for the Senate Committee on the Judiciary, 86th Cong., 2d Sess., 7 (1960), quoted in *Harper & Row, v. Nation Enterprises*, 471 U.S. 539 at 550 (1985); Alan Latman, *The Copyright Law*, 6th ed. (Washington: Bureau of National Affairs, 1986).

28. Latman, "Probative Similarity", *supra* note 25.

29. *Ibid.*

of similarity required to constitute copyright infringement is lessened, and the internet often provides excellent access. One legal commentator astutely wrote:

One notable element of copyright law that has become outdated is the access requirement for proof of copying in a copyright infringement action. Access is one part in a two-step process for establishing an inference of copying. The access requirement was formerly justified because it seemed to be a reasonable piece of circumstantial evidence of copying. Access has lost its significance, however, in light of the technological advances that have occurred since our copyright law was enacted. Geography is a minimal barrier to communication and travel, and copies of all types of creative works can be made quickly, easily, and by a broader range of people.<sup>30</sup>

Access to everything, or as close to everything as the internet can provide, is generally a societal good.<sup>31</sup> Using “universal access” to lessen universally the amount of copying necessary to prove copyright infringement via the substantial similarity doctrine threatens to burden this societal good with risk, as virtually everyone can be assumed or inferred to have entrée to the internet one way or another. Content owners who place works on websites, or who have their works posted and shared without authorization, may presumably take advantage of a lowered burden of proof if they choose to sue anyone who attempts to exploit similar works commercially. This cohort of potential infringement defendants is distinct from the literal copiers whom some content owners have been pursuing so passionately. It is the collection of people whose very creativity and productivity puts them at legal risk. If they perceive their own vulnerability, the standard for substantial similarity will have an important instrumental effect upon whether they are encouraged or discouraged from producing and distributing artistic works.

Accusations related to acts of copying carry a surfeit of negative connotations. If one copies answers from the exam of the student sitting in the next chair, one is a cheater; if one copies the words of others into one’s essay without appropriate attribution, one is a plagiarist.<sup>32</sup> To accuse someone of being a copier or, more colloquially, a “copycat,” is to imply she lacks originality and is free-riding off of the creative efforts of another.<sup>33</sup> Roget’s *Interactive Thesaurus* defines a copycat as a “duplicate” and lists synonyms that include,

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30. Karen Bevill, “Note: Copyright Infringement and Access: Has the Access Requirement Lost Its Probative Value?” (1999) 52:1 Rutgers L. Rev. 311 at 311–312.
  31. Vivien Marx “In Dspace, Ideas are Forever” *New York Times* (3 August 2003), <<http://www.nytimes.com/2003/08/03/edlife/03EDTECH.html?ex=1060935862&ei=1&en=ca918c317925d65a>>.
  32. See e.g. Richard A. Posner, “On Plagiarism” *The Atlantic* (April 2002), <<http://www.theatlantic.com/issues/2002/04/posner.htm>>.
  33. For example, at this site: [www.peroxide\\_girl.tripod.com/peroxide\\_girl/id24.html](http://www.peroxide_girl.tripod.com/peroxide_girl/id24.html), Christina Aguilera is accused of being a “copy copy copycat” who overzealously emulates Britney Spears in an effort to replicate Britney’s career success.

analogue, carbon, carbon copy, clone, companion, coordinate, correlate, counterfeit, counterpart, counterscript, dead ringer, ditto, double, dupe, duplication, facsimile, fake, fellow, flimsy, germination, imitation, knock off, likeness, look-alike, match, mate, mimeo, obverse, parallel, phony, photocopy, Photostat, pirate, reciprocal, recurrence, repetition, replica, replication, repro, reproduction, ringer, second, similarity, spitting image, stat, twin, and xerox.<sup>34</sup>

All of these terms evoke literal copying to some degree (note that “pirate” is actually one of the words listed), and none suggests anything particularly positive.

## 2.2. Facts and Fictions

Facts are simple and facts are straight  
 Facts are lazy and facts are late  
 Facts all come with points of view  
 Facts don't do what I want them to<sup>35</sup>

One context in which unauthorized substantive copying has been somewhat consistently tolerated, at least by the courts, is when an underlying work is factual in nature.<sup>36</sup> Back in 1879 the United States Supreme Court avowed that “the very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains” and trenchantly observed “this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book.”<sup>37</sup> In 1991, the Court reaffirmed the copy-ability (and uncopyrightability) of facts, writing: “Raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.”<sup>38</sup>

Jane Ginsburg has noted that facts do not exist in the ionosphere waiting to be harvested; they are coined or manufactured by researchers, much as writers create fiction.<sup>39</sup> As Jessica Litman explained:

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34. See *Roget's Interactive Thesaurus, First Edition (v 1.0.0)* (Lexico Publishing Group, LLC 2003), <<http://www.thesaurus.reference.com/search?q=copycat>>.
35. Talking Heads, “Crosseyed and Painless” on *Remain in Light* (Warner Brothers, 1990).
36. This essay does not address the issue of compilations of fact, and the associated copyright protection of original selection, coordination and arrangement, see e.g. Kurt Fernstrom, “The NBA May Own the Game, But It Doesn't Own the Score: A Case Comment on *NBA v. Motorola*” (1997) 22 Rutgers L. Rec. 5.
37. *Baker v. Selden*, 101 U.S. 99 at 103 (1879).
38. *Feist Publications v. Rural Telephone Service*, 499 U.S. 340 at 350 (1991), [Feist].
39. Jane C. Ginsburg, “Sabotaging and Reconstructing History: A Comment on the Scope of Copyright Protection in Works of History after *Hoehling v. Universal City Studios*” (1982) 29 Bull. Copyright Soc'y U.S.A. 647, cited by Jessica Litman, “The Public Domain”, *infra* note 40 at para. 182.

Facts...do not exist independently of the lenses through which they are viewed. Those lenses may be theoretical, methodological, or perceptual; they may be colored by experience or bias or may be shaped by the scope of the researcher's inquiry. Researchers seeking to unearth facts must sift through available evidence, design new avenues of inquiry, choose among myriad conflicting indicia, and supply interpretive paradigms to structure incoherent collections of minutia. Researchers can thus be said to be composing their facts as they go along. In this sense, facts are no more "out there" than are plots, words, or sculptural forms.<sup>40</sup>

The authorability of facts is clearly illustrated in the context of written works of biography and history. No one "discovers" the trajectory of a life or an era, she instead creatively arranges and reports all of the interesting incidents and accidents, hints and allegations that she uncovers about her chosen topic. Books describing the same person or historical period are very likely to resemble each other, and also the reference works upon which they are based. To forbid or render hazardous such similarity is, obviously, to discourage production of these works. One who contemplated writing a third or fourth biography about the same life would, if copyright issues were considered at the outset, have the shape and content of the work determined not only by the subject, but also by elements of the previous biographies that she dare not replicate too closely, if at all. Recognizing this, one court wrote: "To avoid a chilling effect on authors who contemplate tackling an historical issue or event, broad latitude must be granted to subsequent authors who make use of historical subject matter, including theories or plots."<sup>41</sup>

It is certainly true that authors who invest substantial time and effort in pioneering biographical or historical projects may fear being under-protected by copyright laws, especially when they find themselves in a copyright dispute with well-funded opponents. In 1989, Barbara Chase-Riboud published a book about a slave ship, the *Amistad*, which was based partially on the historical record she had extensively researched,<sup>42</sup> and partly comprised of fictional scenes and characters.<sup>43</sup> She called the work *Echo of Lions*, and a man named David Franzoni participated in pitching it to major motion picture studios, including Amblin Entertainment (Steven Spielberg's production company), without success.<sup>44</sup> However, Franzoni was later hired to write the script for *Amistad*, a movie directed by Steven Spielberg and produced by the defendant, a division of Warner Brothers, and was credited as the screenwriter.<sup>45</sup> One could see how on this basis alone, Barbara Chase-Riboud would have felt duped and betrayed. She was also intuitively correct when she asserted that Spielberg's *Amistad* movie "virtually destroyed the market for film rights to [her] novel."<sup>46</sup> Though these circumstances helped provoke the

40. Jessica Litman, "The Public Domain" (1990) 39 Emory L.J. 965 at 996-997.

41. *Hoehling v. Universal City Studios*, 618 F.2d 972 at 977 (2nd Cir. 1980).

42. *Barbara Chase-Riboud v. Dreamworks*, 987 F.Supp. 1222 at 1224 (C.D. Cal. 1997) ("For three years, Plaintiff researched the story of the *Amistad*."). [*Chase-Riboud*].

43. *Ibid.*

44. *Ibid.*

45. *Ibid.*

46. *Ibid.*

copyright infringement suit Chase-Riboud brought against Dreamworks, they did nothing to establish substantial similarity between the two works beyond proving that Dreamworks had access to Chase-Riboud's book,<sup>47</sup> as did the other half million people or more who purchased it.<sup>48</sup>

One of the ways in which Chase-Riboud's attorneys attempted to demonstrate that Dreamworks had infringingly copied her book was by asserting that the defendant appropriated inaccurate historical representations made in her book, drawn from the "partially fictionalized" portion of the enterprise.<sup>49</sup> Indeed, demonstrating that a defendant has copied intentionally-planted mistakes is a common method of illustrating that copying has taken place,<sup>50</sup> but, especially in the context of biographical or historical works, creates some peculiar incentives. Accurate factual depictions are not protectable by copyright,<sup>51</sup> while incorrect information can be deemed protectable creative expression, and the author of the work is under no obligation to identify which factual representations are which. Authors to whom strong copyright protection is an important concern are therefore incentivized to artfully embed false facts in their works that subsequent copiers, and everyone else who reads the book, will assume are true. Those conducting historical or biographical research who rely on, and copy, the factual contentions contained in existing works do so at their peril, as in addition to introducing errors into their own accounts, they may be importing evidence of their own copyright infringement. Because they can be penalized for assuming that what is presented as fact is actually fact, they must approach existing works on subjects of interest with trepidation.

All authors face the reality that the manner in which copyrighted works are "protected" from unauthorized, infringing copying is quite porous, both by design and by practical realities. Locking the sole copy of a novel in a metal box will keep it safe from scanners and photocopiers, but will simultaneously prevent the tome from generating positive reviews or royalties. Once duplicated and distributed, a book can be widely read, and it can influence and inspire the subsequent works of authors who have been exposed to it, whether the volume's author and publishers like it or not. Copyright holders have only the strength and mechanisms of control that the copyright laws give them.

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47. Chase-Riboud lost a Motion for Preliminary Injunction, see *Chase-Riboud*, *supra* note 42, and then reportedly reached a financial settlement with Dreamworks. See e.g. Danny Leigh "How to Rip Off Hollywood" *The Guardian (London)* (21 October 1999) 17 (reporting Chase-Riboud's suit against Dreamworks "ended with an undisclosed pay-off and a statement applauding Steven Spielberg for '(his) courage in making such a splendid piece of work.'").

48. *Chase-Riboud*, *supra* note 42.

49. *Ibid.* at 19–24, 38.

Plaintiff contends that, unlike the historical factual record or any other treatment of this story, in both "Amistad" and "Echo of Lions", Cinque has a voice, understands what is happening to him, and contributes to his defense. Moreover, Plaintiff contends that in both works Cinque remains true to his African roots and calls upon his ancestors for help in his legal battle. He contends that this portrait of Cinque is her creation because the historical record reflects that Cinque did not comprehend the judicial proceedings and did not materially assist in his defense.

50. For example, in *Feist*, *supra* note 38, the plaintiff had planted fake telephone numbers in its directories.

51. At least not outside of the "creative compilations of data" context outlined in Section 103 of the U.S. Copyright Act. See also *Feist*, *supra* note 38.

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### 3. THE CREATIVITY QUANTUM PARADOX

MANY EDUCATED AND OTHERWISE CULTURALLY ASTUTE scholars make the incorrect normative assumption that if they have forthrightly and thoroughly credited their sources, they are immune to copyright infringement liability as well as plagiarism charges.<sup>52</sup> The remarkable fact is, however, that while crediting sources may prevent plagiarism allegations,<sup>53</sup> doing so may actually attract copyright suits, because openly acknowledging the influence of a pre-existing work alerts copyright owners to the fact that an author has used, and perhaps copied from, a protected work without asking permission or paying royalties. Copyright infringement suits premised upon claims of substantial similarity are not a phenomenon widely observed in legal academia, where authoring works arguably substantially similar to those of others is thought to either demonstrate intellectual brilliance or pathological idiocy, depending upon one's view of the underlying work.<sup>54</sup> The career consequences for authoring academic tomes likely to be deemed "wholly derivative" of other scholarly works militate against such undertakings.

Individuals who devote a substantial amount of time and energy into authoring new creative works in other fields or professions, however, may be painfully aware of their susceptibility to accusations of illicit copying.

52. The two concepts are distinct. See e.g. Stuart P. Green, "Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights" (2002) 54:1 *Hastings L.J.* 167 at 202

[C]opyright law and the rule against plagiarism protect different kinds of interests. Copyright law protects a primarily economic interest that a copyright owner has in her work (as well as a broader public interest in the free flow of ideas), whereas the rule against plagiarism protects a personal, or moral, interest. Copyright demands that one obtain formal permission from the copyright owner in order to copy the work. The rule against plagiarism assumes that the writer implicitly gives permission to copy the work, provided that the copier make proper attribution.

See also J.H. Reichman and Paul F. Uhler, "Database Protection at the Crossroads: Recent Developments and Their Impact on Science and Technology" (1999) 14 *Berkeley Tech. L.J.* 793 at 801 <<http://law.berkeley.edu/journals/btlj/articles/vol14/Reichman/html/reader.html>>, ("[P]lagiarism is not the same as copyright infringement; the reuse of facts and data is clearly permitted in copyright law; and another author's popularized version of a prior researcher's factual findings remains perfectly legal."); Mark Lemley, "Rights of Attribution and Integrity in Online Communications" (1995) *J. Online L. art.* 2 ("The reason plagiarism is not necessarily copyright infringement has to do with the fact that copyright law does not condemn all copying—only the copying of certain things, under certain circumstances. There are several important limitations on the scope of copyright protection."); Justin Hughes, "The Personality Interest of Artists and Inventors in Intellectual Property" (1998) 16 *Cardozo Arts & Ent. L.J.* 81 at 164 ("Among academics, at least, the social opprobrium of plagiarism is distinct from the legal liability of copyright infringement."); Laurie Stearns, Comment "Copy Wrong: Plagiarism, Process, Property, and the Law" (1992) 80 *Calif. L. Rev.* 513 at 524 ("The form that the plagiarist's cheating takes—claiming credit for someone else's achievements—is particularly abhorrent. Individuals who do not hesitate to photocopy copyrighted books or videotape copyrighted broadcasts would never dream of representing themselves as the authors of the books or tapes."); L. Ray Patterson, "The Worst Intellectual Property Opinion Ever Written: *Folsom v. Marsh* and Its Legacy" (1998) 5 *J. Intel. Prop. L.* 431 at 441.

The difference between printing and copying as infringement is best demonstrated by the concept of piracy, a sin of the publisher, and plagiarism, a sin of the author. Piracy is the publishing of a copyrighted work without permission but with the author's name. Plagiarism is the copying of a work, in whole or part, without permission and taking the copied material as one's own. Plagiarism, of course, does not require a copyright, for the conduct and effect are the same whether or not the copied material is protected by copyright. Thus, protection from piracy is a matter of the copyright statute and protection from plagiarism is a matter of common law.

But see Jon M. Garon, "Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics" (2003) 88:5 *Cornell L. Rev.* 1278, which makes the startling claim that plagiarism and "copyright piracy" are "conceptual cousins."

53. Stearns, *supra* note 52 at 524.

54. Copyright infringement suits instead pertain to exact copying that impacts royalty revenue streams.

Apprehension about being accused of copyright-infringing copying may dissuade and discourage potential authors from productively building on pre-existing creative works. This fear is created in part by the creativity quantum paradox: it takes very little creativity to engender an entitlement to copyright protection, but, at least rhetorically, seems to take much more creativity, effort and ingenuity to avoid infringing another work.

Courts have emphatically and fairly consistently kept the threshold for copyrightability very low, with statements such as: "All that is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably his own."<sup>55</sup> In cases dating back to *Burrow-Giles Lithographic Co. v. Sarony*<sup>56</sup> in 1884 and *Bleistein v. Donaldson Lithographing Co.*<sup>57</sup> in 1903, the United States Supreme Court has been willing to accept almost any creative contribution as sufficient to sustain a copyright. In *Alfred Bell & Co. v. Catalda*<sup>58</sup> in 1951, mezzotint engravings of famous old paintings in the public domain were deemed protectable by copyright by virtue of the differences between the originals and the mezzotints, even though the engravings' departures from the originals were inadvertent, and probably deeply regrettable to the engravers, though not of course to the copyright lawyers litigating this case on behalf of the plaintiff. Even the United States Supreme Court's 1991 ruling in *Feist Publications v. Rural Telephone Service*, in which the Supreme Court held that creativity was an absolute prerequisite to copyright protection, the amount was still characterized as tiny, a "scintilla."<sup>59</sup> As one commentator described it, "[a] work of 'authorship' is original if it is different from other works, no matter how slight the difference and no matter how the difference arises."<sup>60</sup>

Once a work is vested with copyright, however, a later author who creates a similar work will not avoid copyright infringement liability by investing a scintilla of creative effort of her own. Often, not even multiple scintillas would be adequate to sidestep the perception of illicit copying. In the infringement context, courts have resoundingly articulated the principle that copyrighted works are protected from more than just literal copying, because otherwise free riders would be able to escape infringement liability simply by making "immaterial variations."<sup>61</sup> The second author must make enough changes to constitute "material variations," and even then is at risk, as courts may refuse to "excuse" partial copying simply because aspects or portions of the original work were supplanted by the creative efforts of the infringer.<sup>62</sup>

An author who sought to scrupulously avoid copying might avoid the works of others, and revise accordingly any time she created something at all

55. *Alfred Bell & Co. Ltd. v. Catalda Fine Arts*, 191 F.2d 99 at 102-03 (2nd Cir. 1951).

56. 111 U.S. 53 at 58, 4 S. Ct. 279 (1884).

57. 188 U.S. 239 at 251-52, 23 S. Ct. 298 (1903).

58. *Supra* note 55.

59. *Feist*, *supra* note 38.

60. Robert H. Rotstein, "Beyond Metaphor: Copyright Infringement and the Fiction of the Work" (1993) 68 *Chi.-Kent L. Rev.* 725 at 746.

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

62. See e.g. *Sheldon et al., v. Metro-Goldwyn Pictures Corporation*, 81 F.2d 49 (2nd Cir. 1936), *cert. denied*, 298 U.S. 669 (1936).

familiar or that struck her as even vaguely similar to something she had been exposed to. While one might applaud the desire and energetic dedication to avoiding copying, this hardly seems like a model for prolific production of valuable creative works. It requires authors to sequester themselves from the works of masters, and of their contemporaries, sources otherwise invaluable for instruction and inspiration.

An alternative approach toward avoiding copyright infringement would be to copy only from works in the public domain. At first blush this sounds fool-proof, but consider how many authors have copied from Shakespeare. Shakespeare's heirs may be barred by statute of limitations issues (among others)<sup>63</sup> from filing claims, but anyone else who has copied from Shakespeare in the past eighty years or so may have an enforceable copyright,<sup>64</sup> and the "copyright conscientious" author has to be careful not to veer into similarity with the entire body of copyrighted works, published and even unpublished but "accessible," that copy or borrow from Shakespeare. Lest you think this is hyperbole, contemplate the teaching on this subject by *Nimmer On Copyright*,<sup>65</sup> often referred to by judges as the leading treatise on copyright law,<sup>66</sup> which asserts that Shakespeare's *Romeo and Juliet* and the musical *West Side Story*<sup>67</sup> are substantially similar in expression.<sup>68</sup> The treatise acknowledges that some courts might fail to "accept the above pattern as a sufficiently concrete expression of an idea so as to warrant a finding of substantial similarity," but strongly implies that this alternative view would be incorrect.<sup>69</sup> In consequence, a later author could "appropriate" the same public domain "expression" from *Romeo and Juliet* that the authors of *West Side Story* took,<sup>70</sup> but would first have to have made complicated assessments about precisely which aspects of *West Side Story* this constituted. Since the copying from Shakespeare clearly was not literal, tracking the copied public domain expression, and distilling it from the intertwined "original"

63. William Shakespeare may not even have written all of the works credited to him, see e.g. William S. Niederkorn "Seeing the Fingerprints of Other Hands in Shakespeare" *New York Times* (2 September 2003), <<http://www.nytimes.com/2003/09/02/arts/02SHAK.html>>.

64. The work does not have to be registered or conventionally published to be copyrighted, and simply placing it on the internet may create at least a possibility (if not an inference) of access.

65. Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* (New York: Matthew Bender & Co., 1985).

66. See e.g. *Effects Associates v. Cohen*, 817 F.2d 72 (9th Cir. 1987).

67. *West Side Story* is the story of a U.S.-born Polish boy and a Puerto Rican girl newly arrived in New York, set against the backdrop of clashing street gangs on the city's West side. Things look good for the young lovers in the beginning, but when Tony—much like Romeo—accidentally kills Maria's brother while trying to break up a rumble, violence erupts and tragedy ensues. See e.g. <<http://www.westsidestory.com>>.

68. Nimmer, *supra* note 65 at section 13.03B.

69. *Ibid.*

It must be said that not all courts would accept the above pattern as a sufficiently concrete expression of an idea so as to warrant a finding of substantial similarity. Indeed, some courts have said that a plot as such is not protectible, and that "an author's exclusive rights are largely confined to the details in the manner and method of his own presentation...." In most instances, however, those courts that have denied protection to a "plot" have so defined it as to be the equivalent of an abstract idea. Where plot is more properly defined as "the 'sequence of events' by which the author expresses his 'theme' or 'idea,'" it constitutes a pattern that is sufficiently concrete so as to warrant a finding of substantial similarity if it is common to both plaintiff's and defendant's works. Thus, one decision expressly held that the copyright in a novel includes not "only the form of communication or the mechanism employed" but also "the pattern of the story," adding: "The essence of a novel or any other story for that matter, is the plot, plan, arrangement, characters and dialogue therein contained and not simply its form of articulation. [Internal footnotes omitted.]

70. *West Side Story*, music by Leonard Bernstein, lyrics by Stephen Sondheim, and book by Arthur Laurents.

expression of *West Side Story's* authors, would be onerous, indeterminate, and potentially risky.

### 3.1. A Copying Culture

Despite the strictures of copyright law, we all copy from each other madly and often without attribution.<sup>71</sup> Here is an example: Did you hear about the Canadian Duke Ellington? He wrote a song called "Take the Train, Eh?" Let me hasten to explain that I did not originate that wretched joke, I doubt the person who related it to me composed it either, and the author may prefer not to be identified. Nevertheless, I heard it, remembered it, and passed it along here just for fun, for free and without attribution, as many people do, making me a literal infringer if I manage to remember and repeat the joke verbatim, and perhaps guilty of infringement via "fragmented literal similarity," or "comprehensive non-literal similarity" if I distort it somewhat in the retelling.<sup>72</sup>

Jokes are frequently re-told. Yet, comedians and writers who exploit jokes commercially are still somehow incentivized to continue to produce units of humour.<sup>73</sup> As Jessica Litman has observed, clothing fashions and food recipes do not generally receive copyright protection, and yet we do not go naked and hungry.<sup>74</sup> On the contrary, the American fashion industry is quite dynamic, demonstrably unrestrained by either good taste or copyright infringement suits, and gourmet restaurants abound, succeeding or failing for reasons wholly unrelated to their inability to copyright unique entrees or signature desserts.<sup>75</sup>

Lawyers copy from each other relentlessly. One of the first things a savvy new associate at a large law firm does is locate as many "forms files" as possible, so that the format of a particular variety of brief, memorandum or motion already

71. See e.g. Keith Aoki, "Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain" (1994) 18 Colum.-V.L.A. J.L. & Arts 1 (discussing the effect of romantic authorship on copyright law); James Boyle, "A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading" (1992) 80:6 Cal. L. Rev. 1413 (discussing the influence of romantic authorship on laws regulating information, including copyright); Peter Jaszi, "Toward a Theory of Copyright: The Metamorphoses of 'Authorship'" (1991) Duke L.J. 455 (describing and analyzing the effects of romantic authorship on copyright law); David Lange, "At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium" (1992) Law & Contemp. Probs. 139 (noting and analyzing the influence of romantic authorship on copyright law); Litman, *supra* note 40 (linking modern copyright to romantic authorship); Rotstein, *supra* note 60 (discussing how copyright embraces the literary idea of the autonomous work and its effects on copyright reasoning).
72. The Nimmer treatise suggests these tests for substantial similarity, "fragmented similarity," focusing on copying of direct quotations and direct paraphrasing, and "comprehensive nonliteral similarity" upon whether the fundamental essence or structure of a work has been duplicated. Nimmer, *supra* note 65 at section 13.03[A] [1] [2]. See also *Castle Rock Entertainment v. Carol Publishing Group*, 150 F.3d 132 (2nd Cir. 1998), and *Twin Peaks Productions v. Publications International*, 996 F.2d 1366 (2nd Cir. 1993). (The latter concept sounds alarmingly like copyright's "doctrine of equivalents.")
73. Alleged joke stealing has led to litigation, see e.g. Barry Brown "Suit Is No Laughing Matter for Two Canadian Comics" *The Buffalo News* (9 July 2000) 7A <<http://www.buffalonews.com/>>.

The funny business has turned serious in Canada as one comic prepares to launch a defamation lawsuit against another in what may turn out to be a precedent-setting case about whose line is it anyway? The worst reputation an aspiring comic can have is that he's a joke-stealer. So when Toronto comic Glen Foster accused Edmonton comedian Andrew Grose of lifting Foster's funny line in an e-mail sent to scores of Canadian comics, club owners and executives, the laughing stopped and the lawyering started. "It's less funny from this end," Grose said, after acknowledging he plans to file a \$ 680,000 (U.S.) defamation suit this week against Foster.

74. Jessica Litman, *Digital Copyright* (Amherst: Prometheus Books, 2001) at 105–106.

75. *Ibid.*

accepted for firm use can be adopted, and as much useful text as possible can be culled for re-use. When a judge copies from a lawyer's written work, it is generally viewed as a positive development by the attorney because it usually means the judge has embraced the lawyer's reasoning, and approves of her proposed findings, as well as the manner in which she has articulated them. It may even mean that her client has won.<sup>76</sup>

Scholars quote and cite to each other's words and thoughts, both positively and critically, with great frequency. Legal academics in particular often engage in extensive synopsis, paraphrasing, and re-citing of pre-existing law and theory, which is adorned with such abundant and copious footnoting that it can be difficult to discern where, in any given law review article, an author is articulating an original thought. The words and ideas of others are incorporated into fresh narratives, synthesized into new arguments, and in this way copied. The copying is not intended to usurp the creative output of others but certainly uses and builds upon (or mercilessly thrashes and impugns) pre-existing expressive works.

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#### 4. DELINEATING APPROPRIATE APPROPRIATIONS

IT WOULD UNDOUBTEDLY BE DIFFICULT to apply a uniform substantial similarity-based infringement test fairly and consistently across the wide range of works susceptible to copyright protection. In the pro-copying spirit of this essay, rather than attempt to develop one myself, I direct the reader to the test devised by Learned Hand, articulated below in the context of a copyright dispute concerning fabric motifs:

Both designs have the same general color, and the arches, scrolls, rows of symbols, etc. on one resemble those on the other though they are not identical. Moreover, the patterns in which these figures are distributed to make up the design as a whole are not identical. However, the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same. That is enough...<sup>77</sup>

Reduced to its essence, under the "Learned Hand Peter Pan" test, the defendant's work is not infringingly similar to the plaintiff's work unless the aesthetic appeal of its copyrightable elements would be deemed "the same" by an ordinary observer. Assuming courts will credit ordinary observers with reasonable degrees of astuteness and mental acumen,<sup>78</sup> countenancing what one commen-

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76. But see Jamie S. Dursht, "Judicial Plagiarism: It May Be Fair Use But Is It Ethical" (1996) 18 *Cardozo L. Rev.* 1253. Lawyers sometimes resent being copied by competitors. See for example, Janet L. Conley, "Milberg Weis Tries to Nail Class Action Imitators" (20 November 2002), <<http://www.law.com/jsp/article.jsp?id=1036630458145>>.

77. *Peter Pan Fabrics v. Martin Weiner Corp.*, 274 F.2d 487 at 489 (2nd Cir. 1960) [*Peter Pan Fabrics*].

78. In trademark disputes at least, judges often demonstrate a lack of confidence in the intelligence of the populace. See Ann Bartow, "Likelihood of Confusion" *San Diego L. Rev.* [forthcoming in 2004].

tator has termed the “generally competent” audience,<sup>79</sup> this is a fairly reassuring statement of the law to anyone who intends to build upon or reference works without licensing any rights. If the two works are not almost interchangeable, the latter does not infringe the earlier. Despite the fact that the exact threshold at which similarity becomes substantial will still be in the eye of the beholder, as metaphysically channeled through the trier of fact, copying that aids and informs the creation of new and different works ought to be dependably ascertainable and reliably safe if courts were to routinely and consistently follow this analysis.

This characterization of the appropriate inquiry into substantial similarity is not new, having been articulated by Judge Hand in 1960, nor is it atypical, as hundreds of opinions (and more than a few dissenting judges) have cited to this case<sup>80</sup> and to this test in particular, and have done admirable jobs of applying it.<sup>81</sup> Yet, once some judges see evidence that creative expression has been copied, they assess only two available options, finding infringement or finding fair use. It does not seem to occur to them that discerning a lack of substantial similarity can end an appropriate infringement case quite elegantly and efficiently. They evidence a perception that the very act of copying exudes an aura of actionable evil. They need to be reminded that admissions of copying are not admissions of infringement, and detecting copying is not the same as finding substantial similarity.

#### 4.1. *Catching the Wind*

Consider the impact that an application of this test might have had in *Suntrust Bank v. Houghton Mifflin*,<sup>82</sup> in which Alice Randall’s novel *The Wind Done Gone* was alleged to infringe the late Martha Mitchell’s copyrighted book *Gone With*

79. Rotstein, *supra* note 60 at 784–785:

I would suggest that, as a matter of policy, there is good reason for copyright to focus on what might be termed the “generally competent” audience, that is, the audience that has the necessary linguistic, generic, and rhetorical competence to perceive and understand the codes at work in particular texts. “Generic or rhetorical competence...presupposes a knowledge of rhetorical and literary norms in order to permit the recognition of deviation from those norms that constitute the canon, the institutionalized heritage of language and literature.” If a particular audience—say, the “lay” observer—lacks the knowledge of the generic, rhetorical, and linguistic codes at work in the texts being compared in a copyright case, it would not be prudent or fair for that audience to serve as the yardstick by which substantial similarity is measured. Such an observer does not always know what to look for or how to listen, just as one who cannot read a foreign language cannot usefully (for copyright purposes, at least) pass judgment on a text written in that language. Moreover, a generally competent audience would normally include the market for the plaintiff’s text, though it would not be limited to that market. And the generally competent audience has the ability to discriminate between convention and modulation of convention, thus avoiding precipitous conclusions of similarity that an audience unfamiliar with a genre may draw.

So rather than speaking of a “lay” observer or of an “intended” audience (unless this means a generally competent audience) copyright infringement could more usefully be tested against the audience with competence in the particular genres at issue in litigation. For example, where highly technical texts are at issue, it makes more sense to test questions of substantial similarity against the expectations and response of an audience that has competence in the genre. Similarly, an infringement case involving children’s television programs would test similarity in the context of the audience with the most competence, that is, children. [Internal footnotes omitted.]

80. *Shepherd’s Citations*, Lexis search of *Peter Pan Fabrics*, *supra* note 77.

81. See e.g. *Kootenia Homes v. Reliable Homes* 2002 U.S. Dist. LEXIS 235 (D. Minn. 2002), [*Kootenia Homes*].

Next, the Court must evaluate the response of the ordinary, reasonable person as to whether or not a substantial similarity in expression exists. Judge Learned Hand phrased this issue as whether ‘the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them and regard their aesthetic appeal as the same.’

See also *Peter Pan Fabrics*, *supra* note 77.

82. 268 F.3d 1257 (11th Cir. 2001) [*Suntrust Bank*].

*The Wind*. Randall had set out to tell a story that evoked and referenced Mitchell's lengthy (1,024 page) fictional chronicle of a Southern plantation during the Civil War and Reconstruction but was very different in most respects. Randall, in the form of a much trimmer 224-page first-person fictional diary, focused on the lives of slaves, with dissimilar depictions of the main characters, divergence in plotting, and a radically disparate point of view.<sup>83</sup> Certainly, Randall's intention was to evoke aspects of *Gone With The Wind*, but as a mechanism for telling her own story. As one brief example, the final lines of *Gone With The Wind* are, "Tomorrow I'll think of some way to get him back. After all, tomorrow is another day," while *The Wind Done Gone* ends with the words, "For all those we love for whom tomorrow will not be another day, we send the sweet prayer of resting in peace."<sup>84</sup>

Rather than relying on the First Amendment and then fair use grounds, the court could have asked whether the two books were substantially similar.<sup>85</sup> It would have answered in the negative,<sup>86</sup> as it would be ridiculous to conclude that ordinary observers would find their aesthetic appeals the same.<sup>87</sup> This analysis would have rhetorically freed authors everywhere to write their own "Mitchellesque," or, and this is an important point, "Randallesque" novels set during the Civil War, as long as the test was correctly applied, regardless of whether subsequent copyright actions were framed as violating the right to make reproductions or the right to make derivative works.<sup>88</sup>

Unfortunately, the notion of conceptual copyright consistency seems to escape Houghton Mifflin Co., Randall's publisher. Shortly after passionately defending Randall's right to "parody" *Gone With The Wind* in court,<sup>89</sup> Houghton Mifflin brought a copyright suit against the religious group, Jews for Jesus, for using parodic images of the cartoon monkey, Curious George, in pamphlets it employed for proselytizing.<sup>90</sup> The company also has vehemently opposed publi-

83. See e.g. Deborah Ayer "The Wind Done Dug Up the Dirty Laundry" *Newsday* (28 May 2001) A23.

In "The Wind Done Gone," ...[Randall] reveals the truth behind the myth of the South so deeply etched by Margaret Mitchell's "Gone With the Wind." As Cynara, Randall's protagonist, proclaims, the truth is plain: "Georgia is dirty laundry what needs washing." In a bitterly contested parody of Mitchell's romance with Southern history, Randall reinvents both characters and themes: the dashing Rhett Butler becomes a middle-aged has-been, Ashley Wilkes, as Dreamy Gentleman, lusts after not Melanie (Mealy Mouth), but her brother; and Scarlett O'Hara is demoted simply to Other. Although "The Wind Done Gone" initially seems a novel about memory, its companion theme is the failure of imagination, the inability to picture a perspective different from one's own.

84. *Suntrust Bank*, *supra* note 82 at 1272.

85. *Ibid.* "Defendant-Appellant Houghton Mifflin, the publisher of TWDG ... argues that there is no substantial similarity between the two works or, in the alternative, that the doctrine of fair use protects TWDG because it is primarily a parody of GWTW."

86. *Ibid.* at 1274-1275.

87. Imagine trying to write a review or book report about one book having read only the other book.

88. See e.g. *Vault Corp. v. Quaid Software Limited*, 847 F.2d 255 at 267-268 (5th Cir. 1988) (refusing to find infringement of § 106(2) without a showing of substantial similarity); *Litchfield v. Spielberg*, 736 F.2d 1352 at 1357 (9th Cir. 1984) (holding that substantial similarity is required to prove infringement of both § 106(1) and § 106(2)), *cert. denied*, 470 U.S. 1052 (1985).

89. See e.g. <[http://www.houghtonmifflinbooks.com/features/randall\\_url/](http://www.houghtonmifflinbooks.com/features/randall_url/)>.

90. See e.g. "Curious George for Jesus?" *Chicago Tribune* (7 September 2001); Robert Gearty "Curious George Biz Goes Ape in Suit" *Daily News* (5 September 2001) 13; Patricia Hurtado "Curious George Goes to Court; Jews for Jesus Calls Furious Publisher's Suit Spurious" *Newsday* (5 September 2001) A17.

cation of a reference book to J.R.R. Tolkien's *Lord of the Rings* series.<sup>91</sup> Though not a named party to a substantial similarity based copyright infringement suit that the disputed reference book engendered, Houghton Mifflin is the U.S. publisher of Tolkien's works of fiction<sup>92</sup> and appears to be quite protective of its Tolkien franchise.

#### 4.2. Stealing Style

Let me propose a different view of *Steinberg v. Columbia Pictures*. Artist Saul Steinberg drew a famous *New Yorker* magazine cover he titled *A View of the World from Ninth Avenue*.<sup>93</sup> The cover was so popular it was made into a poster that was widely distributed. One of the places a copy of the poster alighted was on the wall of the office of the Executive Art Director of Columbia Pictures, where an artist referred to it, and copied stylistic elements from it, in an effort to make a movie poster he was designing look more "New York-ish."<sup>94</sup> After the movie poster was distributed advertising the Robin Williams vehicle *Moscow on the Hudson*, Steinberg sued for copyright infringement and prevailed on summary judgment.<sup>95</sup> The opinion expressly rejects the substantial similarity test articulated by Learned Hand in *Peter Pan Fabrics*.<sup>96</sup>

If one reads the Steinberg case as David-artist triumphs over large scum sucking Goliath-corporation, the outcome is very satisfying. It is also, however, a cautionary tale about the perils of stylistic copying, borrowing and evoking iconic imagery, and of deriving artistic inspiration from the copyrighted works of others. The ordinary observer would not perceive the two posters as "the same" for even a millisecond. Steinberg's poster humorously illustrates the myopia and self-absorption of residents who refer to New York as "The City" and assume everyone knows to which city they are referring. It portrays impossibly wide and

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91. Susan Decker "New Battle Brews in Middle Earth; Tolkien Heirs Sue Over Publication of Reference Book" *Houston Chronicle* (3 February 2002) 8.

92. *Ibid.*

93. See e.g. "Saul Steinberg Exhibit at Arthur Ross Gallery", <<http://www.upenn.edu/almanac/v42/n11/back.html>>.

94. *Steinberg v. Columbia Pictures Industries*, 663 F.Supp. 706 at 710 (S.D.N.Y. 1987), <[http://www.law.cornell.edu/copyright/cases/663\\_FSupp\\_706.htm](http://www.law.cornell.edu/copyright/cases/663_FSupp_706.htm)>.

In designing this illustration, Columbia's executive art director, Kevin Nolan, has admitted that he specifically referred to Steinberg's poster, and indeed, that he purchased it and hung it, among others, in his office. Furthermore, Nolan explicitly directed the outside artist whom he retained to execute his design, Craig Nelson, to use Steinberg's poster to achieve a more recognizably New York look. Indeed, Nelson acknowledged having used the facade of one particular edifice, at Nolan's suggestion that it would render his drawing more "New York-ish."

95. *Ibid.*

96. *Ibid.* at 711. The definition of "substantial similarity" in this circuit is "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." *Ideal Toy v. Fab-Lu Ltd.*, 360 F.2d 1021 at 1022 (2d Cir. 1966); *Silverman v. CBS*, 632 F.Supp. 1344 at 1351–52. A plaintiff need no longer meet the severe "ordinary observer" test established by Judge Learned Hand in *Peter Pan Fabrics*, *supra* note 77; *Uneeda Doll Co. v. Regent Baby Products*, 355 F.Supp. 438 at 450 (E.D.N.Y. 1972). Under Judge Hand's formulation, there would be substantial similarity only where "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same." *Peter Pan Fabrics*, *supra* note 77 at 489. Moreover, it is now recognized that "the copying need not be of every detail so long as the copy is substantially similar to the copyrighted work." *Comptone Co. v. Rayex Corp.*, 251 F.2d 487 at 488 (2d Cir. 1958). See also *Durham Industries v. Tomy Corp.*, 630 F.2d 905 (2d Cir. 1980) at 911–12; *Novelty Textile Mills v. Joan Fabrics Corp.*, 558 F.2d 1090 (2d Cir. 1997) at 1092–93.

scrupulously clean streets and broad sidewalks populated by wiry, excited pedestrians. The composition of the background suggests that civilization effectively ends at the Hudson River, with little of interest between it and the Pacific Ocean, and nothing very important beyond.

Columbia's movie poster, however, contains the large visages of three actors in the foreground where they appear to be standing in front of, or possibly in, the Hudson River. It depicts Moscow in the background as the only well-defined urban centre on the entire European continent, and has an admittedly Steinbergian slice of Manhattan in between. The defendant was deemed guilty of producing a poster with a "striking stylistic relationship" to Steinberg's work, having appropriated his "sketchy whimsical style" and "childlike spiky block print."<sup>97</sup> According to the court, there was "no inherent justification for using this style of lettering to label New York City streets," as it was "associated with New York only through Steinberg's poster."<sup>98</sup> Confession may be good for the soul, but admitting copying is severely detrimental to copyright infringement defences.

Copying style and appropriating evocative power are not copyright infringements unless the resulting work is substantially similar to the inspirational one. Allowing comparisons of style rather than complete works to underpin a substantial similarity analysis is what enables, for example, the heirs of Alexander Calder to bully and intimidate artists making kinetic metal mobiles, impeding sales by some, and discouraging others altogether, even if they employ shapes, colors and configurations that Calder never utilized.<sup>99</sup> Any use of copyright power that impedes the creation and distribution of new works inherently undermines the very goals of copyright law and needs to be challenged.

### 4.3. *Tunes and Sampling*

A consistently rigorous approach to gauging substantial similarity would bring tremendous changes to some categories of copyrighted works. However, in the context of music, the analysis in cases in which one song was alleged to be too melodically similar to another would not be appreciably altered. For example, consider *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*,<sup>100</sup> in which late songwriter and former Beatle George Harrison was successfully sued for copyright infringement by the owners of the copyright in Ronnie Mack's Motown hit, *He's So Fine*, over substantial similarities to Harrison's *My Sweet Lord*. The court was quite sympathetic to Harrison, expressly noting a sincere belief that his substantial copying was done at a subconscious level.<sup>101</sup> The judge's kindhearted

97. *Ibid.* at 712–713.

98. *Ibid.* at 713.

99. See e.g. Winnie Hu "Store Wars: When a Mobile Is Not a Calder; Museum Shops Bar Artists In Deference to His Estate" *New York Times* (6 August 1998) E1.

100. *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F.Supp. 177 (S.D.N.Y. 1976).

101. *Ibid.*

What happened? I conclude that the composer, in seeking musical materials to clothe his thoughts, was working with various possibilities. As he tried this possibility and that, there came to the surface of his mind a particular combination that pleased him as being one he felt would be appealing to a prospective listener; in other words, that this combination of sounds would work. Why? Because his subconscious knew it already had worked in a song his conscious mind did not remember. Having arrived at this pleasing combination of sounds, the recording was made, the lead sheet prepared for copyright and the song became an enormous success. Did Harrison deliberately use the music of *He's So Fine*? I do not believe he did so deliberately. [Internal footnotes omitted.]

infringement finding may have simply been a function of Harrison's celebrity, but compares favourably to the stealing and thievery analogies sometimes employed in similar circumstances. Harrison deserved respect and recognition for creating a new song in his own right and was entitled to the presumption that any literal or close to literal copying was unintentional. All artists in the same or similar circumstances deserve, but rarely receive, like treatment.

Aspects of the opinion leave me feeling somewhat less compassionate toward George Harrison than the judge who authored it, but this is solely because of Harrison's attempts to deflect blame for the "song plagiarism" to Billy Preston.<sup>102</sup> While Preston may indeed have had a role in the actual unconscious copying, Harrison's tacit assignment of culpability would seem less self-serving and less nefarious if Billy Preston had been given co-credit for writing the musical composition, but instead Harrison had claimed sole authorship. In any event, I credit myself with being a generically competent audience member, and the melodies sound virtually identical to me. I have demonstrated this to students in my Copyright Law classes by playing a Chiffons' recording of *He's So Fine*, then quickly following with the least similar sounding version of *My Sweet Lord* that could be located, which is much slower and astoundingly twangy, as it makes heavy use of the steel guitar. Some of the students tend to look dubious until, at the appropriate moments of *My Sweet Lord* I perkily chime in with the "do lang do lang do lang" refrain from *He's So Fine*, and typically they either immediately register the extreme melodic similarities, or astutely pretend that they do, so that I will cease singing.

Another potential "subconscious copying" case was recently dismissed after Country Joe McDonald, who used to be part of Country Joe McDonald and the Fish (and leads a cheer in the 1969 Woodstock movie spelling out a four-letter word that isn't "Fish") prevailed in a copyright infringement suit on laches grounds.<sup>103</sup> His penned-in-1965, *I Feel Like I'm Fixin' to Die Rag*, was accused, in 2001, of infringing the copyrighted melody of another tune, *Muskrat Ramble*, which was putatively composed in 1924.<sup>104</sup> McDonald stopped performing the song for almost two years, believing singing the song in public would subject him to a \$150,000 fine. He did so despite acute audience demand for the *I Feel Like I'm Fixin' to Die Rag* because of its passionate and timely antiwar message.<sup>105</sup> Meanwhile, there is some indication a similar sounding folk tune provided the inspiration for the *Muskrat Ramble* melody.<sup>106</sup> This dispute aptly illustrates the

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102. *Ibid.* at n. 10.

The Court: To be as careful as I can now in summing this up, you can't really say that you or Billy Preston or somebody else didn't somewhere along the line suggest these; all you know is that when Billy Preston sang them that way at the recording session, you felt they were a successful way to sing this, and you kept it?

The Witness: Yes, I mean at that time we chose what is a good performance.

The Court: And you felt it was a worthy piece of music?

The Witness: Yes...

103. Country Joe's Place, <<http://www.countryjoe.com/lawsuit.htm>>.

104. *Ibid.* at <<http://www.countryjoe.com/lawsuit.htm#complaint>>.

105. *Ibid.* at <<http://www.countryjoe.com/lawsuit.htm#state>>.

106. See "Muskrat Ramble: Froggy's New Orleans Jazz & Mardi Gras", <<http://www.geocities.com/BourbonStreet/5135/muskrat.html>>.

length of time that the danger of copyright infringement allegations can linger, though happily the outcome also carries an optimistic message about fairness.

Unlike cases in which one song was alleged to be substantially similar to another, the jurisprudence with respect to "sampling" the songs of others would be significantly altered.<sup>107</sup> Though literal copying might still be subject to the vagaries of fair use, if the lyrics and melody of a song were sampled in a manner that did not implicate copyrights in a sound recording (in other words, were re-performed rather than taken from another recording), the initial analysis should be rooted in the substantial similarity inquiry. If a song that copied excerpts from other musical compositions could not be plausibly mistaken for any of the sampled works, then it should not be deemed substantially similar. At most, copyright law could impose an attribution requirement. This approach would hopefully preclude outcomes such as the holding in one case in which the sampling of a short keyboard riff in an otherwise completely different musical composition provoked the judicial rebuke that "'Thou Shalt Not Steal' has been an admonition followed since the dawn of civilization."<sup>108</sup>

#### 4.4. *String of Puppies*

Consider another case in which intentional copying was deemed tantamount to infringing copying, despite stark dissimilarities in the disputed works. Artist Jeff Koons encountered a black and white photograph depicting an ordinary man and woman holding eight German shepherd puppies, and it gave him the idea for a collection of works he entitled the "Banality Show." He made a three dimensional sculpture based on the picture, giving the people colourful clown faces, placing flowers in their hair, and depicting the puppies in blue, with bulbous noses. He named the piece "String of Puppies." The photograph's copyright holder brought a copyright infringement suit, *Rogers v. Koons*, and prevailed on summary judgment after Koons admitted copying aspects of the photograph.<sup>109</sup> As with the Steinberg case, the fact that there had been copying was undisputed. That there was substantial similarity seems eminently questionable, however, and inapposite to the Steinberg dispute, the copying at issue pertained to subject matter rather than to the style, form, or nature of the work that

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107. See generally Negativland, "The Public Domain: Two Relationships to a Cultural Public Domain" (2003) 66 *Law & Contemp. Probs.* 239; Henry Self, "Digital Sampling, A Cultural Perspective" (2002) 9 *UCLA Ent. L. Rev.* 347; Charles E. Maier, "A Sample for Pay Keeps the Lawyers Away: A Proposed Solution for Artists Who Sample and Artists who are Sampled" (2003) 5 *Vand. J. Ent. L. & Prac.* 100; Stephen R. Wilson, "Music Sampling Lawsuits: Does Looping Music Samples Defeat the De Minimis Defense?" (2002) 1 *J. High Tech. L.* 179; Ronald Gaither, "The Chillin' Effect of Section 506: The Battle Over Digital Sampling in Rap Music" (2001) 3 *Vand. J. Ent. L. & Prac.* 195; Matthew G. Passmore, Note, "A Brief Return to the Digital Sampling Debate" (1998) 20 *Hastings Comm. & Ent. L.J.* 833; Neela Kartha, Comment "Digital Sampling and Copyright Law in a Social Context: No More Colorblindness!!" (Fall 1996/Spring 1997) 14 *U. Miami Ent. & Sports L. Rev.* 218; Carl A. Falstrom, Note, "Thou Shalt Not Steal: *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.* and the Future of Digital Sound Sampling in Popular Music" (1994) 45 *Hastings L.J.* 359; Randy S. Kravis, Comment, "Does a Song by Any Other Name Still Sound as Sweet?: Digital Sampling and Its Copyright Implications" (1993) 43 *Am. U.L. Rev.* 231; A. Dean Johnson, "Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits" (1993) 21 *Fla. St. U.L. Rev.* 135; Note, "A New Spin on Music Sampling: A Case For Fair Pay" (1992) 105 *Harv. L. Rev.* 726.

108. *Grand Upright Music Limited v. Warner Brothers Records*, 780 F.Supp. 182 (S.D.N.Y. 1991).

109. *Art Rogers v. Jeff Koons*, 960 F.2d 301 (2nd Cir. 1991), cert. denied, 113 S. Ct. 365 (1992).

connected the sculpture to the photograph. One might fault Koons for failing to acknowledge the inspirational impact of the photographer's work, but if he had attempted to secure permission to copy the picture, it would likely have been expensive or denied. Because the aesthetic appeal of the works is very different, and because the U.S. copyright law largely eschews imposing "moral rights"-based attribution requirements, the outcome of this case was arguably incorrect.

#### 4.5. Copyrighting Cookie-Cutter Cottages

Dramatic examples of the deleterious impact of expansive application of the substantial similarity doctrine reside at the intersection of copyrights and architecture. Though architectural plans have long been copyright protected by virtue of being "writings, charts and graphs," and ornamental features as "pictorial, graphic or sculptural works,"<sup>110</sup> architectural works themselves did not receive specific stand-alone protection until 1990.<sup>111</sup> Specifically adding architectural works to the list of copyrightable works in Section 106 was driven by a perceived need to comply with the *Berne Copyright Convention*, rather than a lack of creative architectural output.<sup>112</sup>

Section 101 of the *Copyright Act* defines an architectural work as, "the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings."<sup>113</sup> It further specifies that an architectural work "includes the overall form as well as the arrangement and composition of spaces and elements in the design, but it does not include individual standard features."<sup>114</sup> A related provision in the *Code of Federal Regulations* elaborates somewhat by providing definitions, such as explaining that buildings are defined as "humanly habitable structures that are intended to be both permanent and stationary, such as houses and office buildings, and other permanent and stationary structures designed for human occupancy, including, but not limited to churches, museums, gazebos, and garden pavilions."<sup>115</sup> It also establishes limitations, excluding structures "such as bridges, cloverleaves [sic], dams, walkways, tents, recreational vehicles, mobile homes, and boats."<sup>116</sup> Why the drafters did not want to incentivize new mobile home designs is unspecified and unclear, and though arguably correct, inconsistent with awarding copyright protection to very simple buildings.

The need for copyright protection for unique, dramatic buildings was probably greatly overstated by proponents of this amendment to the *Copyright Act*. While it is possible that unimaginative builders would copy the particular

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110. U.S. *Copyright Act*, *supra* note 11 at § 102(a)(5).

111. *Architectural Works Copyright Protection Act*, Title VII *Judicial Improvements Act of 1990*, Pub. L. No. 101-650, 104 Stat. 5089, 5133 (1990).

112. See e.g. Todd Hixon, Note, "The Architectural Works Copyright Protection Act of 1990: At Odds With The Traditional Limitations of American Copyright Law" (1995) 37 *Ariz. L. Rev.* 629.

113. 17 U.S.C. § 101 (1990).

114. *Ibid.*

115. *Ibid.*

116. *Ibid.* at § 101(d)(1).

appearance of an iconic building such as the Transamerica Pyramid<sup>117</sup> or one of the Guggenheim Museums,<sup>118</sup> it is intuitively more likely that they would either opt for something boring, boxy and cost-efficient, or, if they had the money and the inclination, commission the creation of an original eye-catching architectural statement with which to make their own singular artistic and architectural statement. The United States had plenty of architecture before it became specifically protected by copyright, and it is not at all apparent that this amendment stimulated creation of more or better buildings. One thing that certainly proliferated afterwards was copyright litigation over architectural works, frequently in the context of mass produced single-family residential dwellings.

The *Richmond Homes* case,<sup>119</sup> decided in 1994, involved an architectural copyright dispute between two competitors in the Charlottesville, Virginia housing market. The court described the plaintiff architectural work, a relatively modest residential house plan sold in bulk to six local real estate development corporations, as “not particularly unusual,”<sup>120</sup> “like all modern mass-produced homes...comprised of standard features,”<sup>121</sup> and without aspects or components that were ‘original elements of house design’.<sup>122</sup> Nevertheless, after citing *Feist* for the proposition that a work need only exhibit a “minimal degree of creativity,”<sup>123</sup> the court decided that the plaintiff held a valid copyright in the floor plan and exterior design of the home, and the defendant’s tract house plan was substantially similar to it. The defendant had sold fourteen homes based on its infringing house plan, at prices ranging from \$101,000 to \$134,000.<sup>124</sup>

The Court found that the defendant had “access” to the plaintiff’s design because real estate agents in the area extensively distributed marketing brochures which depicted the exterior and floor plans of the home.<sup>125</sup> The defendant’s “copying” was in response to customer demand for a particular layout and design of exterior; customers would have been familiar with this particular style of house as a consequence of its popularity in the area.<sup>126</sup> The test for substantial similarity that the court seemed to adopt was whether the works “could be

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117. See e.g. “The Pyramid Center”, <<http://www.tapyramid.com/>>; “About the Pyramid”, <[http://www.transamerica.com/company\\_profile/about\\_the\\_pyramid/](http://www.transamerica.com/company_profile/about_the_pyramid/)>; “Transamerica Pyramid”, <<http://www.skyscrapers.com/re/en/wm/bu/118715/>>.

118. See e.g. “Guggenheim Museum”, <<http://www.guggenheim.org/>>.

119. *Richmond Homes Management v. Raintree, Inc.*, 862 F.Supp 1517 (W.D. Va. 1994) [*Richmond Homes* (1994)], *aff’d* in part and remanded by: *Richmond Homes Management v. Raintree, Inc.*, 66 F.3d 316 (4th Cir. 1995).

120. *Ibid.*

121. *Ibid.* at 1524.

122. *Ibid.*

123. *Ibid.* at 1523.

124. *Ibid.*

125. *Ibid.*

126. *Ibid.*

attributed to the same author,"<sup>127</sup> or "consider[ed]...products of the same author."<sup>128</sup>

Based on the low threshold of originality required for copyrightability, the plaintiff was able to secure a copyright in a design that did not differ much from pre-existing designs. The court specifically observed that "protection extends to the most mundane, functional products of modern commercial architecture so long as the minimum originality requirement of copyright law is met."<sup>129</sup> The defendant's plan differed from the plaintiff's plan by at least this increment, and in some cases by substantially more, as the design of each house built was altered in response to customer input.<sup>130</sup> However, the court's opinion in this case made clear its view that while the plaintiff's design only had to differ from another that was in the public domain<sup>131</sup> by a small amount to be copyright-worthy, the defendant's "second generation"<sup>132</sup> design variation had to differ significantly to prevent infringing upon the plaintiff's copyright, and it did not, especially given the court's view that "infringement can be established on the basis of infringing either the floor plans or the exterior or both."<sup>133</sup> Had the defendant made substantial changes to the plaintiff's design, which the evidence clearly suggests it copied in several aspects, it might have avoided copyright liability. However, it would probably also have alienated its customers, who apparently had clear visions of the type of homes they wanted, but did not choose to purchase from one of the corporations that built homes using the plaintiff's designs.

This decision demonstrates the potential value of asserting and defending copyrights in "the most mundane, functional products of modern commercial architecture." The plaintiff received \$199,848 in damages, injunctive relief,<sup>134</sup> and a monopoly that gave the builders purchasing the plaintiff's plans a competitive advantage, since other area builders might reasonably conclude that they could not build similar homes without risking infringement suits. What is less comprehensible is how and to what extent this outcome encourages the creation

127. *Ibid.* at 1522.

128. *Ibid.* at 1527. See also *Arthur Rutenberg Homes v. Maloney*, 891 F.Supp. 1560 ("The level of originality required for copyright protection is not especially elevated."). Contrast the test articulated by another court in another architectural copyright case, which was: "whether the accused is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's protectable expression by taking material of substance and value." (*LZT/Filliung Partnership, LLP, v. Cody/Braun & Associates*, 117 F.Supp. 2d 745 at 752 (N.D. Ill. 2000), citing *Wildlife Express v. Carol Wright Sales* 18 F.3d 502 at 509 (7th Cir. 1994) and *Atari v. North American Philips Consumer Electronics*, 672 F.2d 607 at 614 (7th Cir. 1982)); See also *Ronald Mayotte & Associates and Superb Homes v. MGC Building Co.*, 36 U.S.Q.P.2d (BNA) 1793 (S.D. Mich. 1995) where: "Plaintiffs must ... show 'substantial similarity' between the copyrightable attributes of the two sets of architectural plans. Copyright protection extends only to original features of architectural works.... [W]hen analyzing the issue of substantial similarity ... [t]he owner of copyrighted architectural plans must point to the 'original design elements expressive of the [designer's] creativity'." (quoting *J.R. Lazaro Builders, Inc. v. R.E. Ripberger Buildings, Inc.*, 883 F.Supp. 336 at 343 (S.D. Ind. 1995).

129. *Richmond Homes* (1994), *supra* note 119 at 1517, 1521.

130. *Ibid.* at 1525.

131. *Ibid.* The plaintiff's work, called the "Louisa," was a derivative work that was virtually identical in some respects to a plan called the "Heritage." See also *Joyce*, *supra* note 21 at 223. The "Heritage" was constructed before the effective date of the *Architectural Works Copyright Protection Act*, so as a structure was unprotected by Section 102(a)(8) and had entered the public domain.

132. *Richmond Homes* (1994), *supra* note 119 at 1526.

133. *Ibid.* at 1527.

134. *Richmond Homes Management v. Raintree Inc.*, 1996 U.S. App. LEXIS 31850 (4th Cir. Va. 1996).

of new architectural works. Area builders might be motivated to commission new and adequately “non-similar” residential design plans that still manage to appeal to customers who were attracted to the plaintiff’s design. However, for modest, mass-produced homes, the number of designs meeting this criteria that can co-exist without overlapping is apt to be quite finite. One court recently wrote that while “the use of certain individual features, such as the bay windows or the octagonal entrance, is neither original nor an expression of artistic merit, [this did] not preclude a determination that the combination of such components as a separate entity is both original and copyrightable.”<sup>135</sup> A mainstream newspaper warned readers:

Though you may move a door here and there, add a few more windows, or bump a family room out another foot, the house may bear a striking similarity to Builder Jones’. If he can demonstrate that you signed the visitor’s log at his model and took one of his brochures or that you met with him and discussed the project at length, he can make a case for copyright infringement.... Because the copyright law is a federal statute, violating it is a federal offense and the maximum penalty for each infringement can be as high as \$150,000. In addition to stiff fines, the builder who stole the plans may suddenly find his operation shut down and his buyers in legal limbo. They’ve paid for houses they can’t occupy. In one case, Cooney’s builder client, accompanied by U.S. Marshals, seized 13 houses until the case was resolved.<sup>136</sup>

This is likely to inspire fear in homebuyers as well as homebuilders and facilitate the extraction of copyright licensing fees for even commonplace designs and blueprints, even though some courts do exemplary jobs of keeping “substantial similarity” in architecture appropriately narrow.<sup>137</sup> One can certainly understand why a person would prefer paying undeserved royalties to enduring lengthy, expensive litigation, or to accepting alternatives such as illogical, inconvenient but indisputably “original” kitchen designs or bathroom locations. Copyright law, however, should not inflict such unappealing options.

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## 5. CONCLUSION

ANY APPLICATION of the substantial similarity doctrine that halts or burdens the creation and distribution of new works is deeply flawed and detrimental to the incentivizing and distributive goals of the copyright system. This essay requests nothing in the way of new legislation or novel judicial analysis. All that United States courts need do to minimize the risk of damaging, erroneous infringement findings is to adhere more consistently to an extant body of case law. To accomplish this, some jurists will need to repress any visceral negative emotional reactions that acts of copying provoke in them and concentrate on correctly

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135. *Nelson-Salabes, Inc. v. Morningside Holdings*, 2001 WL 419002 (D. Md. 2001), <[http://www.law.cornell.edu/copyright/cases/284\\_F3d\\_505.htm](http://www.law.cornell.edu/copyright/cases/284_F3d_505.htm)>.

136. Katherine Salant “Nail Down Who Owns Plan Before You Build” *Orlando Sentinel* (17 February 2002) J26.

137. See *Kootenia Homes*, *supra* note 81 at 235.

understanding the precepts and policy goals of the copyright law. Comprehensive adoption and predictable application of the “Learned Hand Peter Pan” formulation of the substantial similarity test would dissuade scorched earth “cease and desist” behaviour by some content owners, and have salutary effects on the willingness of authors to “copy” aspects of pre-existing works to facilitate the creation of new works of their own. It would also reduce the risks of attribution, potentially encouraging authors to openly credit the works that directed and inspired them.