

*This is your Release #16 (May 2019)*

# Substantial Similarity in Copyright Law

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In this release, the authors update and expand *Substantial Similarity in Copyright Law* with useful new discussion of the following important topics, along with many others:

**Scènes à faire:** In a case involving greeting cards, the federal district court in Massachusetts held that the common elements of a menorah are *scènes à faire* (*LovePop, Inc. v. PaperPopCards, Inc.*). See § 2:3.3, at note 44.3.

**Probative similarity:** Although the Third Circuit had previously used “substantial similarity” ambiguously, its opinion in *Tanksley v. Daniels* indicated that the court will now “prefer the term ‘probative similarity’ in the copying context while reserving ‘substantial similarity’ for the question of material appropriation.” See § 3:1.3, at note 52.1.

**Plots:** Many infringement claims fail because similarities in the general pattern or skeleton of a plot were not accompanied by protected details of expression. So it was with a claim involving the story of little trees aspiring to be a famous Christmas tree in a popular public space (*Nicassio v. Viacom International, Inc.*). See § 4:2, at note 27.1.

**Fictional characters:** In *Levi v. Twentieth Century Fox Film Corp.*, a federal district court in Virginia noted that copyright law provides very limited protection to characters presented in a creative work. See § 4:4, at note 36.

**Computer output data:** It is uncertain whether the copyright in a computer program extends to a program’s output when that output consists of data, calculations, or renderings created by the program in response to user inputs. The one case that seems to have taken the question head on, in a Texas federal district court, held that a database created by computer software based on inputs from the user was a protectable

*(continued on reverse)*

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element of the computer program (*Digital Drilling Data Systems LLC v. Petrolink Services Inc.*). See new § 8:5.

**Sound recordings:** According to the Ninth Circuit in *ABS Entertainment, Inc. v. CBS Corp.*, the remastering of sound recordings consisting of technical changes that do not alter the “essential character and identity” of the original recording lacks originality. See § 9:2, at note 36.

**Compilations:** Infringement of a compilation requires “bodily appropriation” of material, said the Ninth Circuit in *Experian Information Solutions, Inc. v. Nationwide Marketing Services, Inc.* Comparing the copied selections to the selections in plaintiff’s work, the court ruled that 80% copying did not amount to bodily appropriation. See § 13:2, at note 9, and § 13:3, at note 17.1.

**Derivative works:** Changing features on the face of the Statue of Liberty in a replica statue was enough to create a derivative work, according to the Court of Federal Claims (*Davidson v. United States*). See § 15:1, at note 14.1.

**Deposit copy:** The authors argue that the Ninth Circuit added a questionable meaning to the term “deposit copy” in *Williams v. Gaye*, a music plagiarism case. The court allowed expert testimony concerning whether elements possibly implied by, but not shown on, the deposit copy should be considered to be part of the copyrighted work. That is incompatible with the statutory intent to establish a concrete measure of copyrighted works through the deposit. See § 17:5, at note 45.

**Works compared:** The release provides new illustrations of the matters in issue in these cases:

- *Folkens v. Wyland Worldwide, LLC* (pictures of dolphins) (see new Appendix A.1.O)
- *Franklin v. X Gear 101, LLC* (bear-face logos) (see new Appendix A.1.P)
- *LovePop, Inc. v. PaperPopCards, Inc.* (pop-up greeting cards) (see new Appendix A.2.J)
- *Davidson v. United States* (Statue of Liberty replica and postage stamp) (see new Appendix A.2.K)
- *Design Basics, LLC v. Ashford Homes, LLC* (designs of houses) (see new Appendix A.7.K)
- *Fabric Selection, Inc. v. NNW Import, Inc.* (fabric designs) (see new Appendix A.9.R)
- *Pohl v. MH SUB I, LLC* (dentist’s before-and-after photographs of teeth) (see new Appendix A.10.L)
- *Maule v. Anheuser Busch, LLC* (depictions of Philadelphia skyline in photograph and neon sign) (see new Appendix A.10.M)
- *Laspatia DeCaro Studio Corp. v. Rimowa GmbH* (photographs of various subjects) (see new Appendix A.10.N)
- *Silvertop Associates, Inc. v. Kangaroo Manufacturing, Inc.* (banana costumes) (see new Appendix A.11.Q)

In addition, the **Table of Cases**, the **Defendant-Plaintiff Table**, and the **Index** have been updated.

## **FILING INSTRUCTIONS**

# **Substantial Similarity in Copyright Law**

**Release #16  
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NUMBERED:**

Title page to I-22

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Title page to I-23

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