This is your Release #18 (June 2021)

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:

- **Striking similarity:** Section 1:3 is updated with a discussion of *Diamond Collection, LLC v. Underwraps Costume Corp.*, a case in which the Eastern District of New York said that, in a case involving multiple works but lacking other evidence of copying, striking similarity with respect to one or more works can give rise to an inference of copying of others. (The works at issue in this case are available in new Appendix A.12.G.)

- **Character copyrightability:** Revisions to section 5:2 examine the decision in *Daniels v. Walt Disney Co.*, where the Ninth Circuit explained that the “story being told” test is separate from the “especially distinctive” test and that, although the characters at issue failed the first test, character development also could provide a basis for copyrightability because the two tests are not mutually exclusive.

- **Filtration:** Updates to chapters 8 and 18 explore *Compulife Software Inc. v. Newman*, an Eleventh Circuit case in which the court clarified the defendant’s burden of proof in a filtration analysis and noted that, if a plaintiff provides a list of elements that it believes are protectible, the plaintiff implicitly concedes that elements not on the list are not protectable (see § 8:6.2). Moreover, the court stated that the Eleventh Circuit rule is that a judge determines which elements should be filtered before a factfinder decides whether the copying was substantial and

(continued on reverse)
indicated that it would likely review a filtration determination de novo (see chapter 18).

- **Computer expert’s role:** Section 8:8 takes note of a case from the Sixth Circuit stating that, when it comes to distinguishing idea from expression and creativity from scènes à faire, “the assistance of an expert is desirable, if not required.”

- **Useful articles:** Chapter 16 on useful articles has been reorganized.

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

- *Berg v. M&F W. Prod., Inc.* (pendant jewelry) (see new Appendix A.4.C)
- *NYC Image Int’l, Inc. v. RS USA, Inc.* (distressed American flag design) (see new Appendix A.8.C)
- *Klauber Bros., Inc. v. QVC, Inc.* (floral fabrics patterns) (see new Appendix A.9.V)
- *Bertuccelli v. Universal City Studios LLC* (masks) (see new Appendix A.12.F)
- *Diamond Collection, LLC v. Underwraps Costume Corp.* (Halloween costumes) (see new Appendix A.12.G)

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

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FILING INSTRUCTIONS

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Remove Old Pages Numbered:

❑ Title page to 5-11
❑ 8-1 to App. A-1
❑ App. A4-1 to App. A4-5
❑ App. A8-1 to App. A12-31
❑ App. B-1 to I-23

Insert New Pages Numbered:

❑ Title page to 5-12
❑ 8-1 to App. A-1
❑ App. A4-1 to App. A4-12
❑ App. A8-1 to App. A12-40
❑ App. B-1 to I-23