

This is your Release #19 (June 2022)

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:

De minimis threshold: The discussion of the *de minimis* concept is expanded to include cases from the Ninth Circuit and the Southern District of New York that rejected a *de minimis* defense to copyright infringement where the degree of copying was total but the display was minimal (see discussion of *Bell v. Wilmott Storage Services* and *Elatab v. Hesperios, Inc.*, respectively, in section 2:1). The discussion also includes two other cases from the Southern District of New York: one in which the court found that copying of NBA player tattoos for use on the players' likenesses in a basketball videogame was *de minimis* because the tattoos as displayed on the players in the game were so small and out of focus as to be indiscernible to the game players, and one in which the court held that the use of photographs was not *de minimis* even though the photos were displayed for at most approximately forty-three seconds, and in many instances only a few seconds, as part of a longer film because the display was prominent (see discussion of *Solid Oak Sketches, LLC v. 2K Games, Inc.* and *Fioranelli v. CBS Broadcasting Inc.*, respectively).

Test for substantial similarity: Revisions to chapter 3 incorporate discussion of *Andy Warhol Foundation for Visual Arts, Inc. v. Goldsmith*, which noted that the "more discerning observer test" is applied to works with "thinner" copyright protection and seems to align the Second Circuit with the First, Third, and Seventh Circuits, which sanction a trademark-law-type range of protection for copyrighted works (see sections 3:1.1[B] and 3:1.5).

(continued on reverse)

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Factual works: New material includes discussion of the “copyright estoppel” doctrine, which courts developed to avoid perversion of the distinction between the copyright protection afforded fictional and non-fictional works (see section 6:1).

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

- *Cisneros Design, Inc. v. Board of County Commissioners of City of Santa Fe* (Southwestern-style icons logo) (see new Appendix A.1.Q)
- *Huffman v. Activision Publishing, Inc.* (poster of wrestler) (see new Appendix A.1.R)
- *Cooley v. Target Corp.* (dot art) (see new Appendix A.1.S)
- *Design Basics, LLC v. Signature Construction, Inc.* (residential architecture plan) (see new Appendix A.7.L)
- *High Five Threads, Inc. v. Michigan Farm Bureau* (hand logo) (see new Appendix A.8.D)
- *Dellamorte, LLC v. Michaels Cos., Inc.* (vampire bat mug) (see new Appendix A.11.T)

Jury instructions: Appendix B has been updated to include jury instructions from *Huffman v. Activision Publishing, Inc.*, a case involving posters.

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 6-17
- 8-1 to App. A1-84
- App. A7-1 to App. A8-19
- App. A11-1 to
App. A11-100
- App. B-1 to I-23

**INSERT NEW PAGES
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- Title page to 6-17
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- App. A11-1 to
App. A11-103
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