

Litigating Copyright Infringement: Reproduction by Substantial Similarity

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§106. Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (2) to reproduce the copyrighted work in copies or phonorecords;

...

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Litigating Infringement

- Plaintiff must prove:
 - Ownership of a valid copyright
 - **Infringement**
 - Copying in fact
 - Misappropriation of copyrightable expression

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Litigating Infringement

- Plaintiff must prove:
 - Ownership of a valid copyright
 - Infringement
 - Copying in Fact
 - Access *and*
 - Similarity
 - Appropriation of copyrightable expression
 - Protected subject matter *and*
 - Substantial similarity
 - as determined by the lay observer

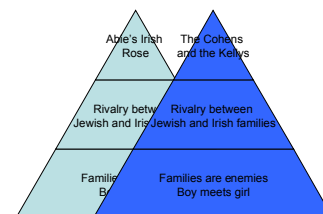
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Nichols v. Universal

Hand, J: Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.

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Nichols v. Universal, abstraction



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Abstraction, filtration



Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.



Pufnstuf



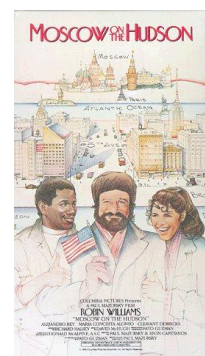
Mayor McCheese

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Extrinsic v. intrinsic analysis

- If there is substantial similarity in ideas [extrinsic],
- *then* the trier of fact must decide whether there is substantial similarity in the expressions of the ideas so as to constitute infringement. The test to be applied in determining whether there is substantial similarity in expressions shall be labeled an intrinsic one -- depending on the response of the ordinary reasonable person. It is intrinsic because it does not depend on the type of external criteria and analysis which marks the extrinsic test.... Because this is an intrinsic test, analytic dissection and expert testimony are not appropriate.

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Steinberg-style. Infringement or not?

- From NYT Sept. 21, 2003, Week in Review, p.1



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Boisson v. Banian, Ltd.

- Judi Boisson's "Alphabet" Quilt
- Our Alphabet quilt spells true Americana. Traditional American motifs such as a schoolhouse, flag, and basket mix easily with lively pastels and primary colors to create a wonderfully updated sampler. Cheerful block letters make learning the alphabet fun and easy.



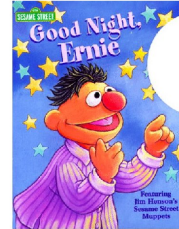
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- Banian's Navy ABC



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Cavalier v. Random House, Inc.



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Computer Associates International v. Altai

- Computer Associates CA-SCHEDULER allows IBM mainframe to schedule jobs, ADAPTER makes it work on different machines
- Altai clean-room developed OSCAR 3.5 to perform the same function
- How do we know whether non-literal elements infringe?

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Abstraction, Filtration, Analysis

- Choose "patterns," levels of abstraction
 - Overall function, modules, instructions
- Separate out the non-protectable elements at each level
 - Elements dictated by efficiency
 - Elements dictated by external factors
 - Elements taken from the public domain
- Compare the protectable elements between the two

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