

Litigating Copyright Infringement: Reproduction by Substantial Similarity

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Litigating Infringement

- Plaintiff must prove:
 - **Ownership of a valid copyright**
 - Copyrightable expression
 - Ownership
 - Infringement

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CCNV v. Reid



§ 201

- (b) Works Made for Hire. In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

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“Work made for hire”

- A “work made for hire” is—
- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a “supplementary work” is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an “instructional text” is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

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- If CCNV had just asked Reid to sign a “work for hire” agreement before he began the sculpture, would that have cleared everything?

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Work made for hire

- (1) Prepared by employee within scope of employment
- or
- (2) specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas

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CCNV v. Reid

- In determining whether a hired party is an employee under the general common law of agency, we consider
 - the hiring party's right to control the manner and means by which the product is accomplished;
- Among the other factors relevant to this inquiry are
 - the skill required;
 - the source of the instrumentalities and tools;
 - the location of the work;
 - the duration of the relationship between the parties;
 - whether the hiring party has the right to assign additional projects to the hired party;
 - the extent of the hired party's discretion over when and how long to work;
 - the method of payment;
 - the hired party's role in hiring and paying assistants;
 - whether the work is part of the regular business of the hiring party;
 - whether the hiring party is in business;
 - the provision of employee benefits;
 - and the tax treatment of the hired party.

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Ownership of Copyright

- Copyright initially vests in the author
 - Natural person
 - Work-for-hire
- Transfers must be in writing
 - Transfer of material object is not transfer of copyright
- License may convey some or all rights
 - see Creative Commons “some rights reserved”

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Litigating Infringement

- Plaintiff must prove:
 - Ownership of a valid copyright
 - Copyrightable expression
 - Ownership
 - **Infringement**
 - **Copying in fact** (independent creation is a defense)
 - **Unlawful appropriation**

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§106. Exclusive rights in copyrighted works

- The owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
- (1) to reproduce the copyrighted work in copies or phonorecords;
 - (2) to prepare derivative works based upon the copyrighted work;
 - (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
 - (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
 - (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
 - (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

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§106. Exclusive rights in copyrighted works

- 1) Reproduction
- 2) Derivative works
- 3) Distribution of copies
- 4) Public performance
literary, musical, dramatic, and choreographic works, and motion pictures and other audiovisual works
- 5) Public display
literary, musical, dramatic, and choreographic works, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work,
- 6) Digital performance of sound recordings

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Litigating Infringement

- Plaintiff must prove:
 - Ownership of a valid copyright
 - **Infringement**

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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**
 - Admission
 - or Circumstantial Evidence
 - » Access
 - » Substantial similarity – even of uncopyrightable elements
 - or Striking Similarity
 - or Common Errors
 - Expert testimony may be used to prove copying

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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

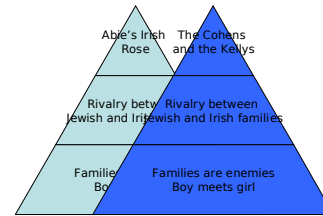
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Nichols v. Universal

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.

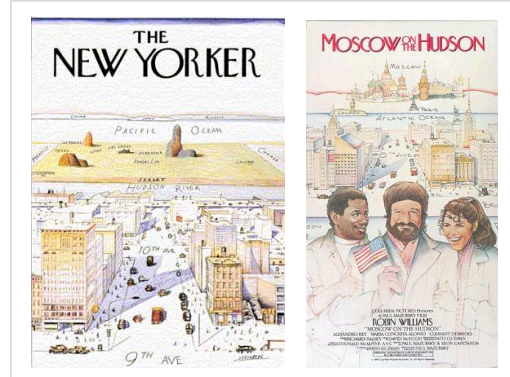
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Nichols v. Universal, abstraction



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Abstraction, filtration



Steinberg-style. Infringement or not?

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



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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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§106. Exclusive rights in copyrighted works

- Reproduction
- **Derivative works**
- Distribution of copies
- Public performance
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- 5) Public display
 - literary, musical, dramatic, and choreographic works, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work,
- Digital performance of sound recordings

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Derivative works

§ 103(a) The subject matter of copyright ... includes compilations and derivative works, ...

§ 101. A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, **as a whole, represent an original work of authorship**, is a "derivative work".

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§ 103. Compilations and derivative works

- (a) The subject matter of copyright ... includes compilations and derivative works, but **protection** for a work employing preexisting material in which copyright subsists **does not extend to any part of the work in which such material has been used unlawfully.**

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Derivative works?

- A movie studio wants to film a new movie on Jonathan Lethem's latest novel.
- A team of youngsters decides to film a recreated "Indiana Jones" in their backyard. It takes them several years.
- A modern composer writes a musical composition inspired by Margaret Mitchell's "Gone with the Wind."

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§103 Compilations and derivative works

- (a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.
- (b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

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Is this a derivative work?



- Lee v. A.R.T. Co. (9th Cir) says **no**
- Mirage Editions v. Albuquerque A.R.T. (7th Cir) says **yes**

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