Expression
Copyright

Copyright Infringement Analysis

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17 U.S.C. § 106

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:

(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.

Elements of prima facie case for copyright infringement (for reproduction right)

1. it's a copyrighted work
   (copyrightable subject matter)
2. that the plaintiff owns
   - I don't know if this is really an element, but it's analysis you might need to do
3. copying
4. substantial appropriation

Elements of prima facie case for copyright infringement (for reproduction right)

1. it's a copyrighted work
   (copyrightable subject matter)
2. that the plaintiff owns

   i.e., the plaintiff has standing to sue because they own the copyright—either all of it or the applicable stick in the bundle (e.g., exclusive license for reproduction by DVD/Blueray/home-video in the U.S.)
3. copying

   can be proven by:
   - direct evidence
   - indirect evidence (access and probative similarity)
4. substantial appropriation (a/k/a "improper appropriation," "unlawful appropriation," "wrongful copying")

   This means enough of the work was taken to amount to infringement.

   The test is "substantial similarity," which might be called *appropriative* substantial similarity for clarity.

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Courts often say "substantial similarity" for this also

This is called "substantial similarity" by courts

Problems

I own an illicitly made photocopy of a secret, never published manual authored in 2020 by Google describing their proprietary search algorithims. It's 500 pages on 8.5-by-11 paper. I was given the photocopy by a friend. When two friends of mine stop by my house, I show it to them, letting them leaf through it and learn Google's proprietary secrets. Have I infringed any of Google's exclusive rights under copyright?

A. Yes
B. No

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A. Yes
B. No ←

I didn't, e.g., effect a reproduction, distribution, public performance, public display, or any other exclusive right.

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A. Yes ←

That infringes the reproduction right and the distribution right.

B. No

I wrote a novel by "re-writing" a copyrighted novel written by J.K. Rowling. What I mean by re-writing is that I didn't literally copy the words and sentences. Instead, I expressed every sentence or paragraph with my own wording. I also changed all the character names. In fact, there are no three words in a row that are the same between Rowling's novel and mine. But the characters have the same substantive traits and the plot has the same elements. Have I infringed any of Rowling's exclusive rights under copyright?

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B. No

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A. Yes ←

This is "non-literal copying," but it will still count as substantial appropriation (a/k/a "copying in law").

B. No

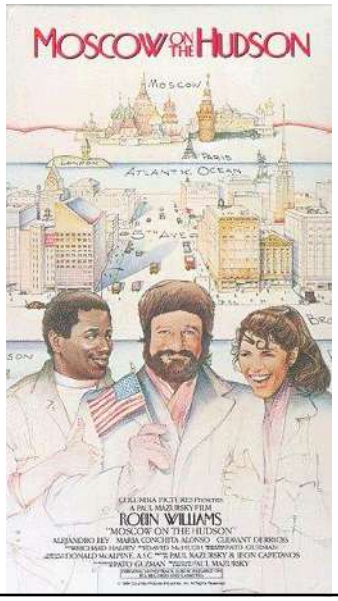
Appropriative substantial similarity

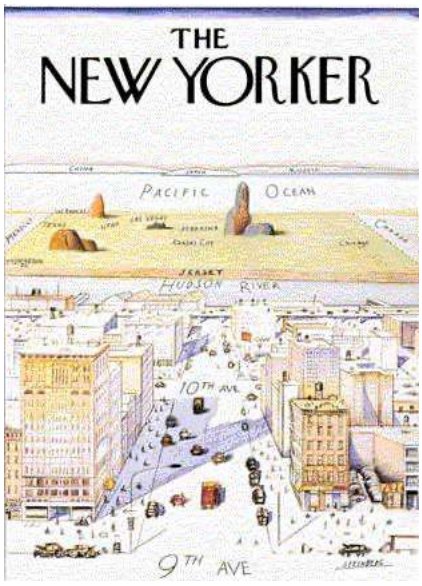
'the test for infringement of a copyright is of necessity vague ... (and) decisions must therefore inevitably be ad hoc.' *Peter Pan Fabrics v. Martin Weiner Corp* (2d Cir. 1960) (L. Hand, J.). It is well established, however, that in order to sustain a claim of copyright infringement the claimant is required to demonstrate a substantial similarity between the copyrighted work and the alleged copy. This is a factual question and the appropriate test for determining whether substantial similarity is present is whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.

Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966)

Realotheticals

Steinberg v. Columbia Pictures (S.D.N.Y. 1987)





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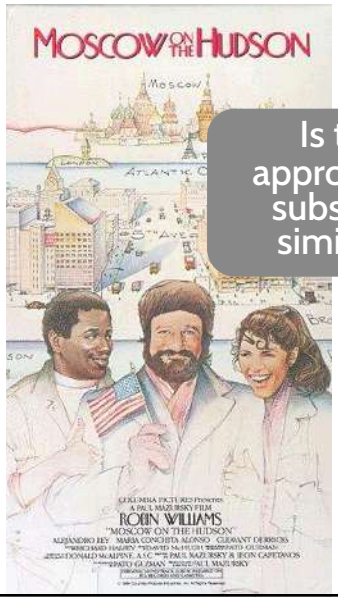
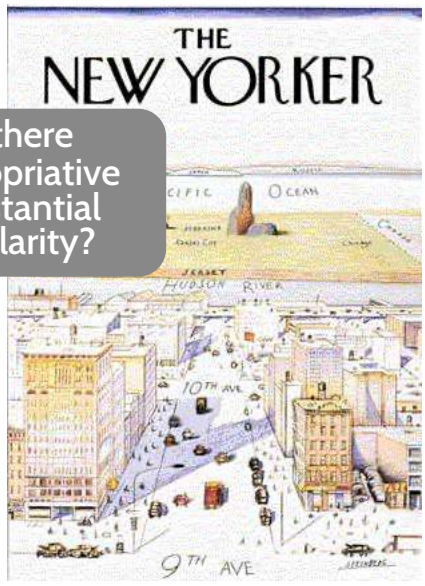
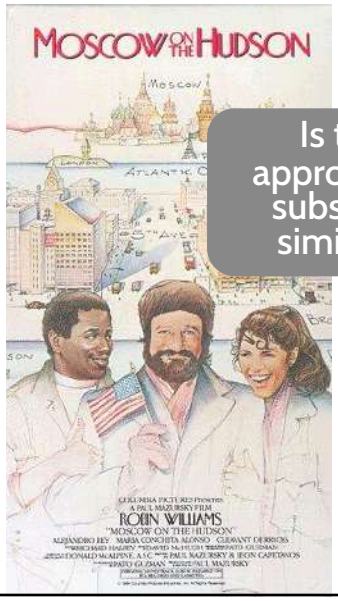




Is there appropriative substantial similarity?

Steinberg v. Columbia Pictures (S.D.N.Y. 1987)



Is there appropriative substantial similarity?

Held: **Yes.**

Even at first glance, one can see the striking stylistic relationship between the posters, and since style is one ingredient of "expression," this relationship is significant. Defendants' illustration was executed in the sketchy, whimsical style that has become one of Steinberg's hallmarks. Both illustrations represent a bird's eye view across the edge of Manhattan and a river bordering New York City to the world beyond. Both depict approximately four city blocks in detail and become increasingly minimalist as the design recedes into the background. Both use the device of a narrow band of blue wash across the top of the poster to represent the sky, and both delineate the horizon with a band of primary red. The strongest similarity is evident in the rendering of the New York City blocks. Both artists chose a vantage point that looks directly down a wide two-way cross street that intersects two avenues before reaching a river. Despite defendants' protestations, this is not an inevitable way of depicting blocks in a city with a grid-like street system, particularly since most New York City cross streets are one-way.

Steinberg v. Columbia Pictures (S.D.N.Y. 1987)