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Copyright Infringement and Defeating Substantial Similarity

Obtaining Pretrial Dismissal of Copyright Claims Absent Clear Court Guidance

TUESDAY, NOVEMBER 8, 2011

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Winning the Copyright Case on Summary Judgment

**Copyright Infringement and Defeating
Substantial Similarity**

Strafford Legal Webinar

November 8, 2011

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| Bingham McCutchen LLP**

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Setting Up a Case for Pre-Trial Dismissal



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The Target: Substantial Similarity

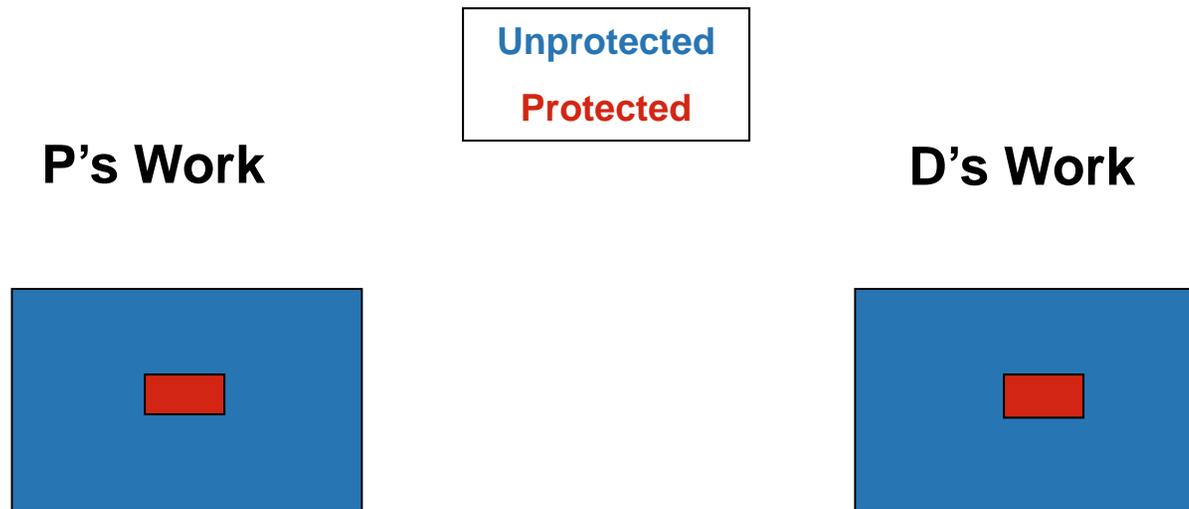
**At the center of any copyright infringement suit
is this question:**



**“Is the defendant’s work ‘substantially similar’ to the
plaintiff’s work?”**

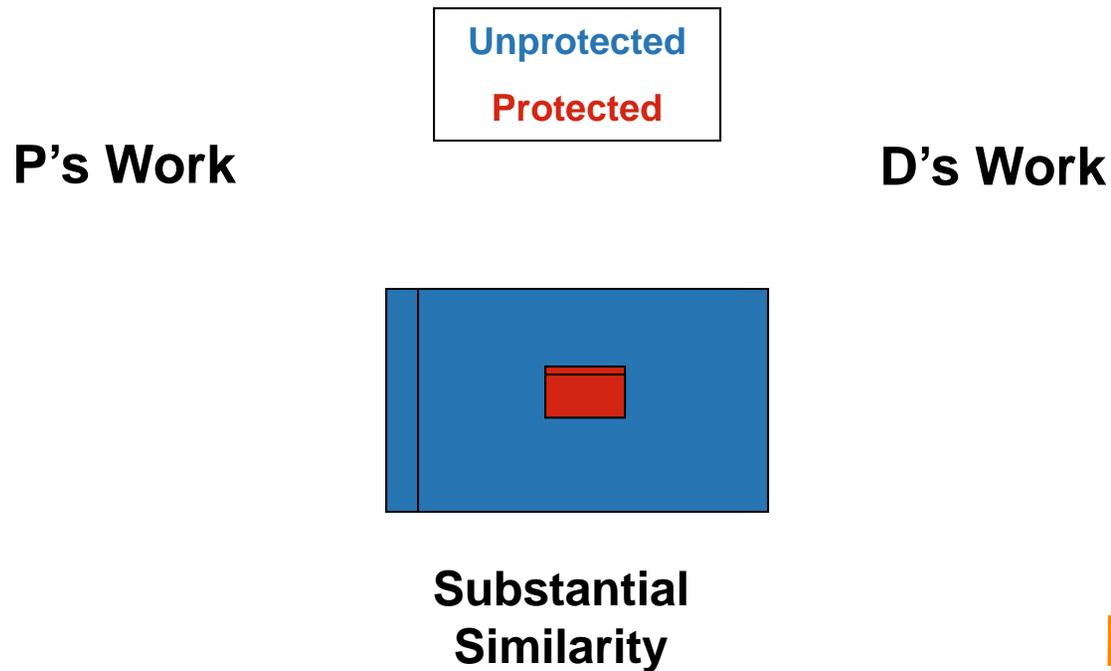
Substantial Similarity

In order for plaintiff to win, ***even if defendant concedes that copying occurred***, the plaintiff must prove that the copying amounted to an improper or unlawful appropriation ***of a sufficient quantum of protected aspects of plaintiff's work***.



Substantial Similarity

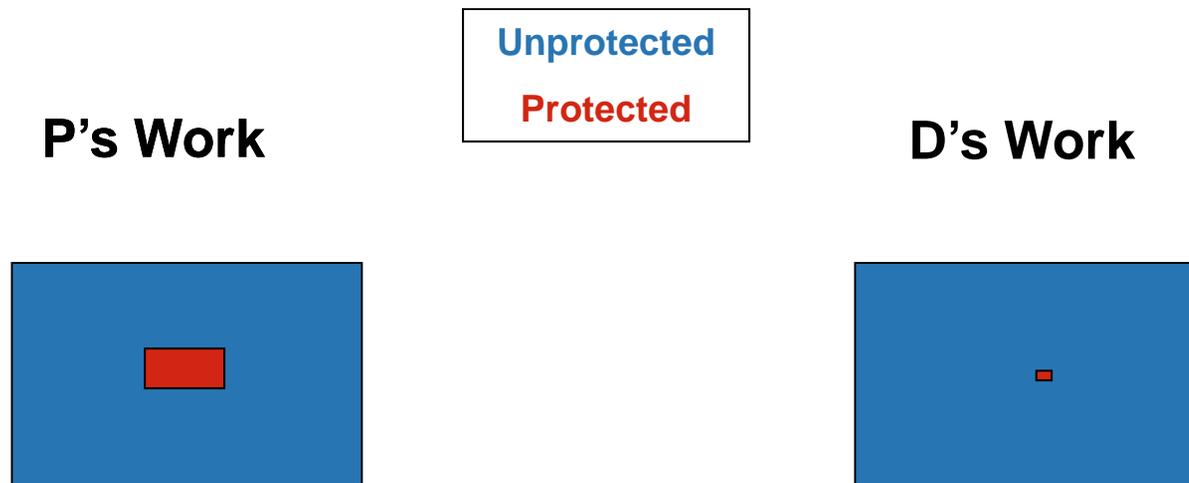
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Substantial Similarity

To avoid liability, defendant's goal is to demonstrate that copying was:

- (1) Not of a quality and/or quantity sufficient to amount to an improper or unlawful appropriation



Substantial Similarity

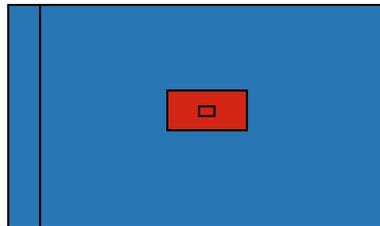
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P's Work

Unprotected
Protected

D's Work



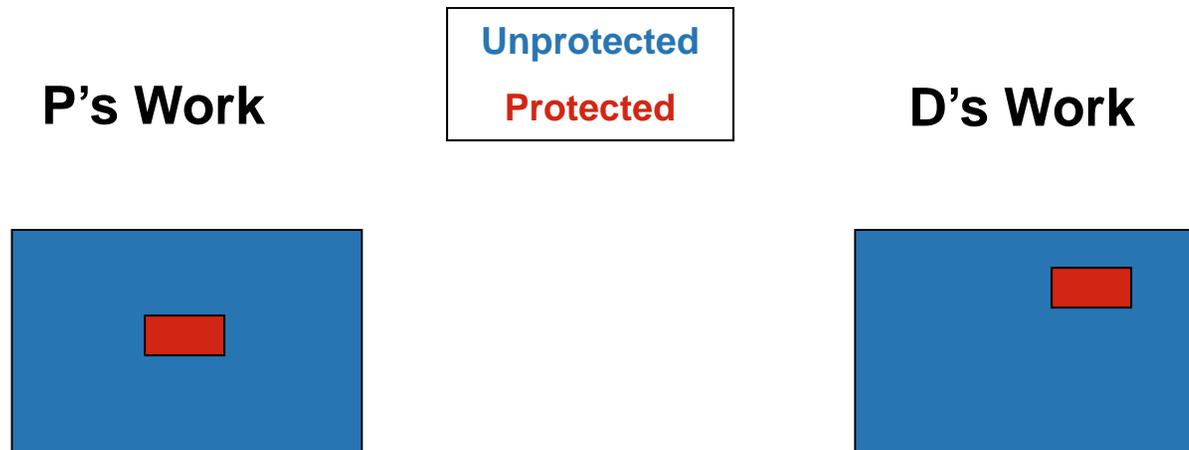
**Similarity is
not substantial**

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Substantial Similarity

To avoid liability, defendant's goal is to demonstrate that copying was:

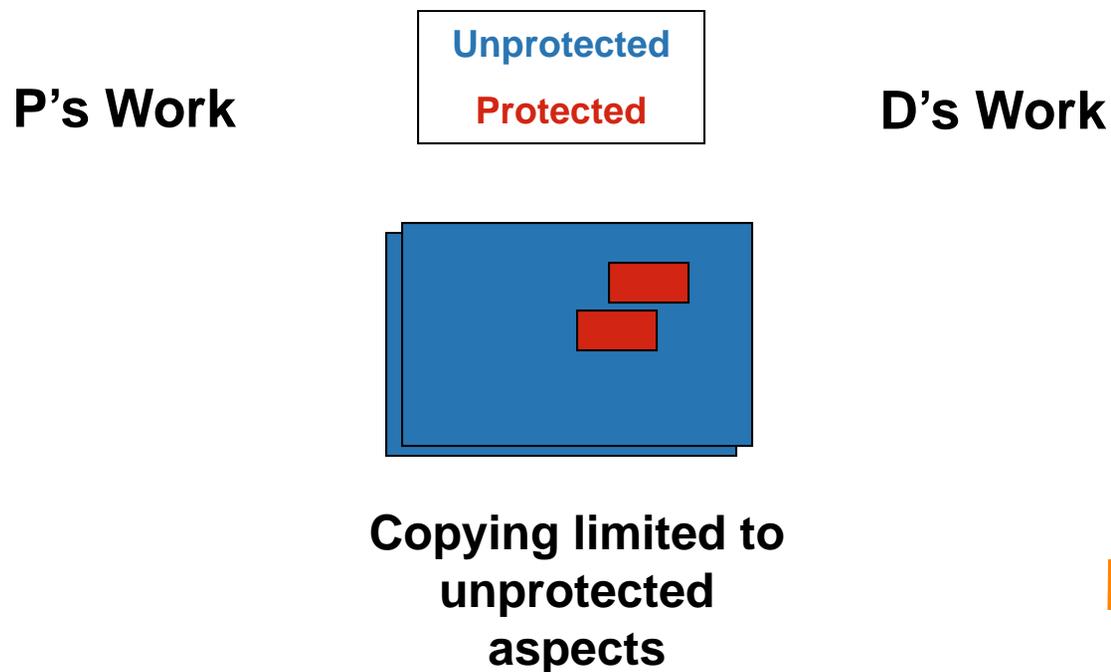
- (1) Not of a quality and/or quantity sufficient to amount to an improper or unlawful appropriation
- (2) Limited to unprotected aspects of plaintiff's work



Substantial Similarity

To avoid liability, defendant's goal is to demonstrate that copying was:

- (1) Not of a quality and/or quantity sufficient to amount to an improper or unlawful appropriation
- (2) Limited to unprotected aspects of plaintiff's work



Obtaining Summary Judgment Seems an Uphill Battle...

“[S]ummary judgment is not highly favored on the substantial similarity issue in copyright cases.”

Berkic v. Crichton, 761 F.2d 1289, 1292 (9th Cir. 1985)

“[S]ubstantial similarity is customarily an extremely close question of fact, [and thus] summary judgment has traditionally been frowned upon in copyright litigation.”

Hoehling v. Universal City Studios, Inc., 618 F.2d 972 (2d Cir. 1980)



“Where reasonable minds could differ on the issue of substantial similarity ... summary judgment is improper.”

Cavalier v. Random House, Inc.,
97 F.3d 815, 922 (9th Cir. 2002)

“Summary judgment on substantial similarity is unusual”

T-Peg, Inc. v. Vt. Timber Works, Inc.,
259 F.3d 97, 112 (1st Cir. 2006)

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... and Analytical Guidance is Scarce

“The determination of the extent of similarity that will constitute a substantial, and hence infringing, similarity **presents one of the most difficult questions in copyright law ... and one that is the least susceptible of helpful generalizations.**”

Nimmer on Copyright, § 13.03 [A] (emphasis added).

“Although it is clear the determination of substantial similarity presents an issue of fact, the **correct procedure for that determination remains clouded.**”

Nimmer on Copyright at § 13.03[E][1] (emphasis added).

Our Survey

- Performed multiple searches on commercial databases to identify all published summary judgment decisions by federal courts in favor of defendants on the issue of substantial similarity from 2006 to the present
- Net result was approximately 50 cases in which defendants were able to obtain summary judgment (or, in some cases, judgment on the pleadings) on the issue of substantial similarity

So it Can be Done

Despite the tenor of the case law, our survey reveals that copyright infringement defendants have moved — successfully — for summary judgment on the issue of substantial similarity.



Setting Up a Copyright Case for the Best Chance of Pre-trial Disposition

1. Overview of the basic copyright case
2. “Similarity” in the context of a copyright case
3. Attacking substantial similarity on summary judgment
4. Practice pointers

Overview of the Basic Copyright Case

The Basic Copyright Infringement Case

To prevail on a copyright infringement claim, a plaintiff must prove two basic elements:

1. Ownership of valid copyright
2. Copying of constituent elements of the work that are original

Feist Publications, Inc. v. Rural Telephone Service Co.,
499 U.S. 340, 361 (1991).

Copying

- A. Actual copying**
- B. Substantial similarity**

“The plaintiff must show not only that the defendant actually copied the plaintiff's work, but also that the defendant's work is ‘substantially similar’ to protectible elements of the plaintiff's work.”

Sturdza v. United Arab Emirates, 281 F.3d 1287, 1295 (D.C. Cir. 2002).

Actual Copying

Can be proved by:

1. Direct evidence

2. Circumstantial evidence of:

a. Access

b. “Probative” similarity

Probative Similarity

- Focuses on similarities between the two works that in the normal course would not be expected to arise absent copying, thus giving rise to an inference of actual copying by defendant
- Consists of indicia that can rebut a (defendant's) claim of independent creation

“Similarity” in the Context of a Copyright Case

Copying Is Not Enough

“Not all copying . . . is copyright infringement.” The plaintiff must prove that the defendant’s copying amounts to **improper or unlawful appropriation** before defendant will be liable.

“The mere fact that a work is copyrighted **does not mean that every element of the work may be protected.**”

Feist Publications, Inc. v. Rural Telephone Service Co.,
499 U.S. 340, 361 (1991).

What is the Test for “Substantial Similarity”?

The traditional “Audience Test”

If an ordinary person who has recently read the story sits through the presentation of the picture, if there has been literary piracy of the story, he should detect that fact without any aid or suggestion or critical analysis by others. The reaction of the public to the matter should be spontaneous and immediate.

Harold Lloyd Corp. v. Witwer, 65 F.2d 1, 18 (9th Cir. 1933), *cert. denied*, 296 U.S. 669 (1933)

Criticism of the Audience Test

- Has not been sanctioned by the Supreme Court and in fact, governing Supreme Court precedent does not rely on the “audience” for any aspect of the substantial similarity analysis. *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991)
- The “Audience Test” should thus be placed in “a mental ‘suspense’ account.” Nimmer on Copyright, § 13.03[E][1]
- The heavy reliance on the visceral reaction of lay person (the “spontaneous and immediate” reaction) risks the impermissible extension of protection to unprotectible aspects, contrary to *Feist’s* requirement that the copying must be of the “constituent elements that are original”
- As a consequence, all circuits have applied a modified “Audience Test” in order to “filter” the unprotected aspects from the analysis

The First Circuit

Would an “ordinary person of reasonable attentiveness ... upon [viewing/listening to both works], conclude that the defendant unlawfully appropriated the plaintiff’s **protectable expression.**”

Johnson v. Gordon, 409 F.3d 12, 18 (1st Cir. 2005).

Cautions against the “over-dissect[ion of] the plaintiff's work,” such that protectable expression is ignored (e.g. even “de minimis” by quantity may by quality be central to the work).

Situation Mgt. Sys. v. Asp. Consulting,
2009 WL 709422, at *5 (1st Cir. Mar. 19, 2009).

The Second Circuit

“[T]he court must find a substantial similarity between the **protectible elements** of the two works. That is, the plaintiff must show that the defendant appropriated the plaintiff's particular means of expressing an idea, not merely that he expressed the same idea.”

Fisher Price, Inc. v. Well-Made Toy Mfg. Corp.,
25 F.3d 119, 123 (2d Cir. 1994).

Order of analysis:

1. Generally, similarity is assessed with respect to both protected and unprotected aspects
2. The unprotected similarities are then filtered out in order to assess whether the similarity of the protected aspects is “substantial”
3. *But* in some cases, the “more discerning” test applies (e.g. where work is of a specialized nature), in which case the above order is reversed

The 9th Circuit

Breaks the “substantial similarity” inquiry into two “tests”:

1. **The Extrinsic Test:** Has there been copying of expression rather than the idea?

Assessed by isolating the “specific criteria that can be listed and analyzed” (based on the type of work) and evaluating whether the “articulable similarities” between those criteria are protectable.

2. **The Intrinsic Test:** According to the ordinary reasonable person, did the copying amount to improper appropriation?

The intrinsic test is a “subjective test that focuses on ‘whether the ordinary, reasonable audience would recognize the defendant's work’ as substantially similar to the plaintiff’s work.

Only the Extrinsic Test is proper for summary judgment. *Kouf v. Walt Disney Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir. 1994).

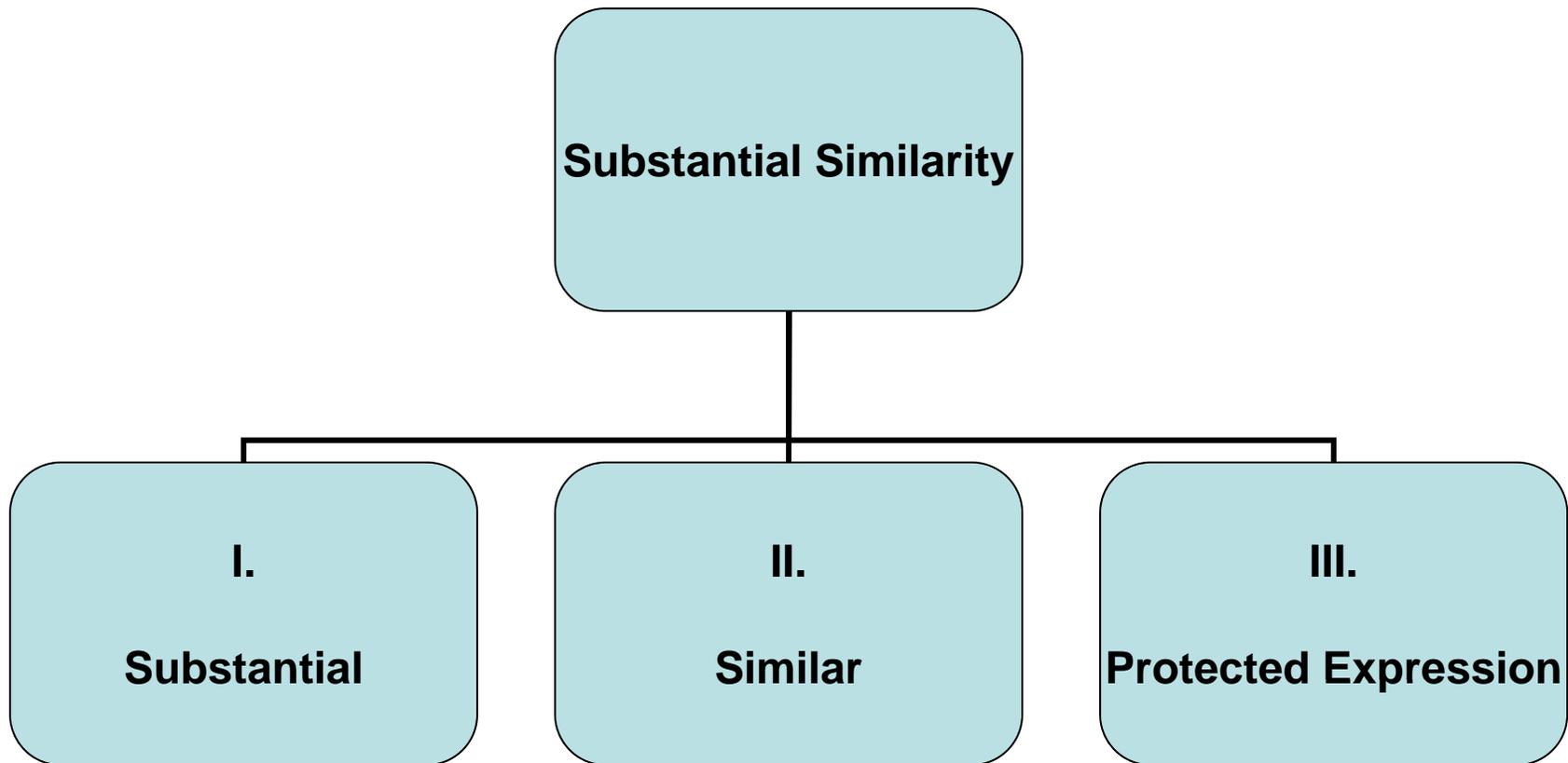
“Similarity” in the Context of a Copyright Case

Regardless of the way the test is articulated, all circuits follow the same general approach for the purposes of assessing “substantial similarity” on summary judgment:

A plaintiff must prove that the respective aspect of defendant’s work is:

- **Similar**
- **Elements** in the plaintiff’s work that are **original** to the plaintiff, and which consist of the plaintiff’s **expression** of the idea (and not simply the idea)
- **“Substantial”** both qualitatively and quantitatively to P’s work

Three Subcomponents of “Substantial Similarity”



I. Substantial — Not De Minimis

If the unauthorized copying is trivial, “the law will not impose legal consequences.”

Davis v. Gap, Inc., 246 F.3d 152, 172
(2d Cir. 2001).

“To establish that the infringement of a copyright is de minimis, and therefore not actionable, the alleged infringer must demonstrate that the copying of the protected material is so trivial as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying.”

Sandoval v. New Line Cinema Corp.,
147 F.3d 215, 217 (2d Cir. 1998)
(internal quotation marks omitted)

II. Similar

“Fragmented Literal Similarity”

Literal, or virtually literal, similarity between P’s and D’s work, but limited to only a discrete portion of P’s work (e.g. one line, one riff).

Nimmer on Copyright, § 13.03[A][2].

“Comprehensive Non-literal Similarity”

Nonliteral similarities between the “fundamental essence, ... structure” or pattern of the works.

Nimmer on Copyright, § 13.03[A][1].

III. Protected Expression (Originality)

“The mere fact that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the *sine qua non* of copyright; *accordingly, copyright protection may extend only to those components of a work that are original to the author.*”

Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 348 (1991) (emphasis added).

III. Protected Expression (Never Ideas)

Copyright protection subsists only in “original works of authorship **fixed in any tangible medium of expression**” and in “no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery ...” 17 U.S.C. § 102(a).

Thus, similarities that are between *ideas*, versus expressions of those ideas, **cannot** serve as a basis for a finding of “substantial similarity.”

“Protected” Versus “Unprotected”

Protected:

A “work ... independently created by the author (as opposed to copied from other works), and that ... possesses at least some minimal degree of creativity.”

Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

“[C]opyright law protects tangible, original expressions of ideas, not ideas themselves.”

Kepner-Tregoe, Inc. v. Leadership Software, 12 F.3d 527, 533 (5th Cir. 1994).

Not Protected:

1. Ideas
2. Merger doctrine
3. Scenes à Faire
4. Facts
5. Unoriginal or common/banal expression

Ideas

Similarities between a plaintiff's and a defendant's works that are ***limited to ideas and general concepts — rather than the expression*** — are not protectible.

- The underlying idea of a book “**combining ... philosophy and religion into a new ‘bible’**”

Phillips v. Beck, 2007 WL 2972605 at * 8 (D. Hawai'i, Oct. 9, 2007).

- The concept of using “**allophones**” (variants of phonemes) **as a teaching tool** for speech therapy

Rustuccia v. Super Duper, Inc., 2008 WL 533800 (N.D. Ga. Feb. 27, 2008).

- “The general concept of an **imaginary world or realm, or of a character searching for a father**”

Randolph v. Dimension Films, 2009 WL 385437 at *5 (S.D. Tex. Feb. 17, 2009).

- The “concept of **combining direct mail and television advertising ...**”

Sun Media Sys. v. KDSM, LLC, 564 F. Supp. 2d 946, 992 (S.D. Iowa 2008).

- A “useful” article

Merger

Where the expression of an underlying idea “merges” with the underlying concept or idea (*i.e.*, a given idea is limited to essentially one basic form of expression), the expression is not protectible.

- The use of “rectangular anthropomorphic sponges, with arms and legs, and big round eyes” in depicting a humanized sea-sponge, as such “are simply stock elements that flow from the idea of humanizing a sponge”

Walker v. Viacom Int’l, Inc., 2008 WL 2050964 at * 8 (N.D. Cal. May 13, 2008).

- A chronological “sequenc[ing] of events” in a work of historical fiction, as “there are very limited ways in telling the story”

Thompson v. Looney’s Tavern Productions, Inc., 204 Fed.Appx. 844 (11th Cir 2006).

- A depiction of a mother mountain lion picking up a kitten near the edge of a drop off, because such a depiction “is “inseparable from the idea” of a mountain lion’s “protective nature”

Dyer v. Napier, 2006 WL 2730747 at * 6 (D. Ariz. 2006).

- Codified statutes, regulations, laws

Scenes á Faire

Elements that flow naturally from the work's theme, commonly repeated in a genre, and/or otherwise indispensable and naturally associated with the treatment of a given idea.

- Drunks, prostitutes, vermin, derelict cars, foot chases, morale problems of policeman in a police fiction. *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d. Cir. 1986)
- Sand dollar currency, seaweed food, seahorse transportation, plates made of mother of pearl in a story about underwater civilization. *Evans v. Wallace Berrie & Co.*, 681 F. Supp. 813, 817 (S.D. Fla. 1988)
- “[T]he presence of hosts who provide witty commentary on the contestants and competition, introductory sequences that feature highlights of sporting events and sounds associated with various sports, spotlights on professional athletes and amateur contestants, camera shots of athletic fields or arenas, trash-talking exchanges, and sports contests” flow necessarily from the idea of a sports-themed reality show featuring amateurs versus professional athletes. *Pino v. Viacom, Inc.*, 2008 WL 704386, at * 5 (D.N.J. Mar. 4, 2008)
- “[T]hemes ... of searching for one’s father and identifying one’s strengths” are “stock elements of science-fiction or adventure stories or plot elements that naturally flow from the broad themes that the two works share with many other works.” *Randolph v. Dimension Films*, 2009 WL 385437, at * 7 (S.D.Tex. Feb. 17, 2009)

Facts

“[F]acts — scientific, historical, biographical, and news of the day . . . may not be copyrighted, and are part of the public domain available to every person.” *Feist Pubs., Inc. v. Rural Tel. Serv., Co.*, 499 U.S. 340, 348 (1991) (internal quotation marks omitted).

- Names, addresses, and telephone numbers are “raw data[, which] does not satisfy the originality requirement”

Feist Pubs v. Rural Tel. Serv., Co., 499 U.S. 340, 361 (1991).

- The facts surrounding the death of Pope John Paul I

Crane v. Poetic Prods. Ltd., 593 F. Supp. 2d 585, 590 (S.D.N.Y. 2009).

- The recounting of a historical account of actual political events in a southern county during the civil war are unprotected historical facts

Thompson v. Looney's Tavern Productions, Inc., 204 Fed.Appx. 844 (11th Cir 2006).

Unoriginal or Common Expression

Elements that lack originality and are commonly found in pop culture or the genre at issue.

- “The character names shared between the two works [“DeCarlo,” “Lynn,” and “Greene,” which] are common names and are used differently in the two works.” *Gal v. Viacom Intern., Inc.*, 518 F. Supp. 2d 526, 547 (S.D.N.Y. 2007)
- A two-measure riff between P’s song and D’s song that was common to the rock and rap music genre. *Landry v. Atlantic Recording Corp.*, 2007 WL 4302074 (E.D. La. Dec. 4, 2007)
- The phrase “holla back” as used in a song, because the phrase is a common, stock phrase with widespread use throughout contemporaneous and popular American music. *Boone v. Jackson*, 206 Fed.Appx. 30 (2d Cir 2006)
- The phrase “Put your money to work” in advertisements for financial services. *JB Oxford & Co. v. First Tenn. Bank Nat. Ass’n*, 27 F. Supp. 2d 784, 798 (M.D. Tenn. 2006)
- A previous work that has fallen into the public domain, e.g. Romeo and Juliet

Attacking “Substantial Similarity” on Summary Judgment

Substantial Similarity on Summary Judgment

Summary judgment may be granted if either:

1. The alleged similarities between the two works concern only non-copyrightable elements of the plaintiff's work
2. The similarity is not “substantial”
3. No reasonable jury could find that the protectible elements within the two works are substantially similar

Obtaining Summary Judgment

1. Identify the “constituent elements” at issue
2. As to each element, apply “filters” to isolate the unprotected aspects from the protected aspects
3. Comparing works as a whole, show that most (or all) similarities are driven by unprotected aspects
4. If any similarities remain, demonstrate that:
 - a. They are de minimis
 - b. No reasonable jury can find similar

1. Identify the Constituent Elements

Depends on the type of work and what plaintiff is alleging. Some common elements examined include:

- For books, television shows, plays, movies, screenplays or scripts:
 - Plot
 - Characters
 - Theme
 - Setting, mood, and pace
 - Dialogue
 - Sequence of events

1. Identify the Constituent Elements

Depends on the type of work and what plaintiff is alleging. Some common elements examined include:

- For music:
 - Melodic/harmonic arrangement
 - Rhythm
 - Bridges/Tonal themes
 - Lyrics
 - Pace

1. Identify the Constituent Elements

Depends on the type of work and what plaintiff is alleging. Some common elements examined include:

- For architectural works:
 - Relative size and arrangement of rooms
 - Arrangement of doors, windows, or other building features
 - Shapes of features (roofs, doors, windows, driveways)

1. Identify the Constituent Elements

Depends on the type of work and what plaintiff is alleging. Some common elements examined include:

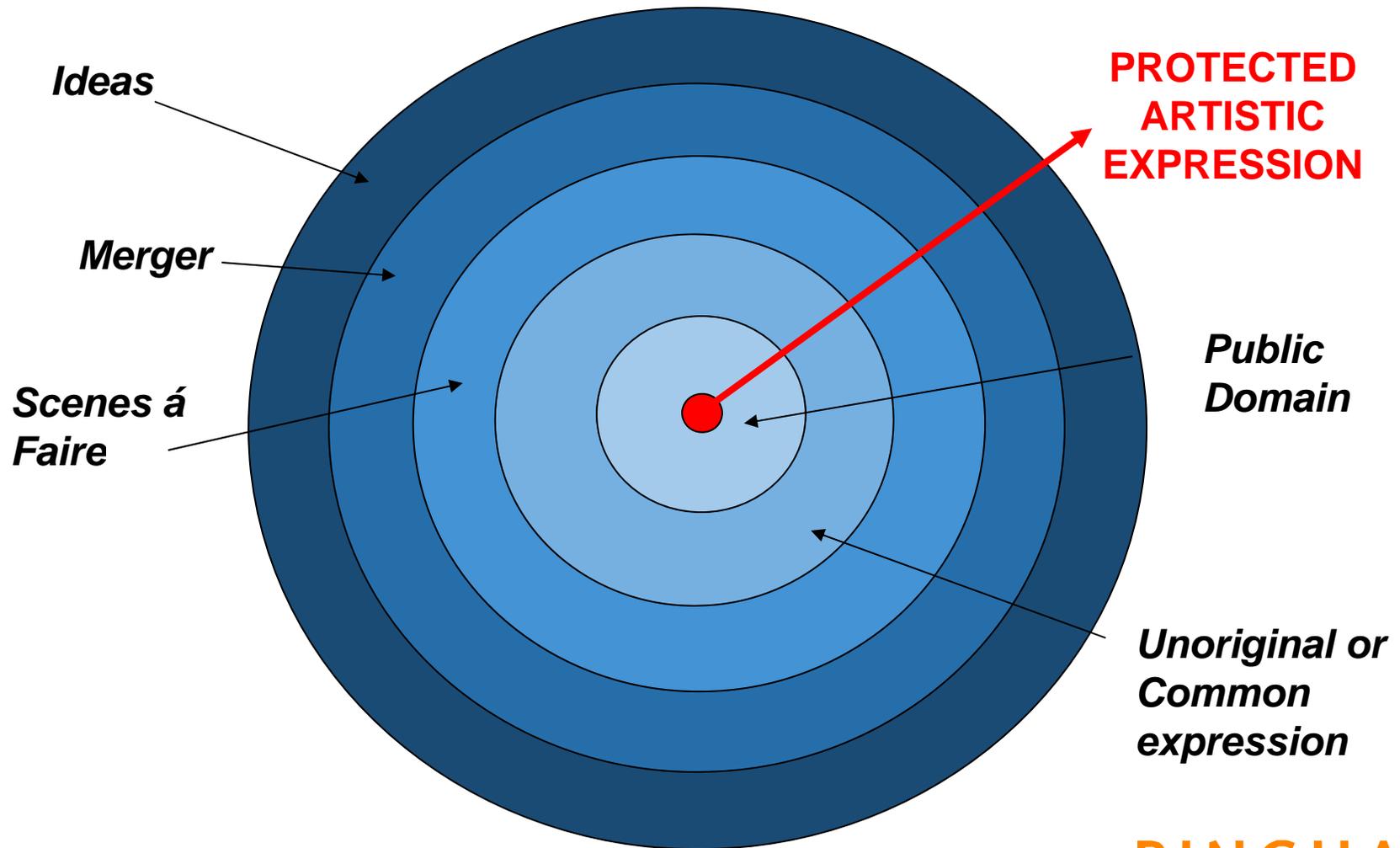
- For computer programs:
 - Instructions in an operating system
 - Source code
 - Structure, sequence, and organization of source code
 - Interface specifications
 - Status or menu screens

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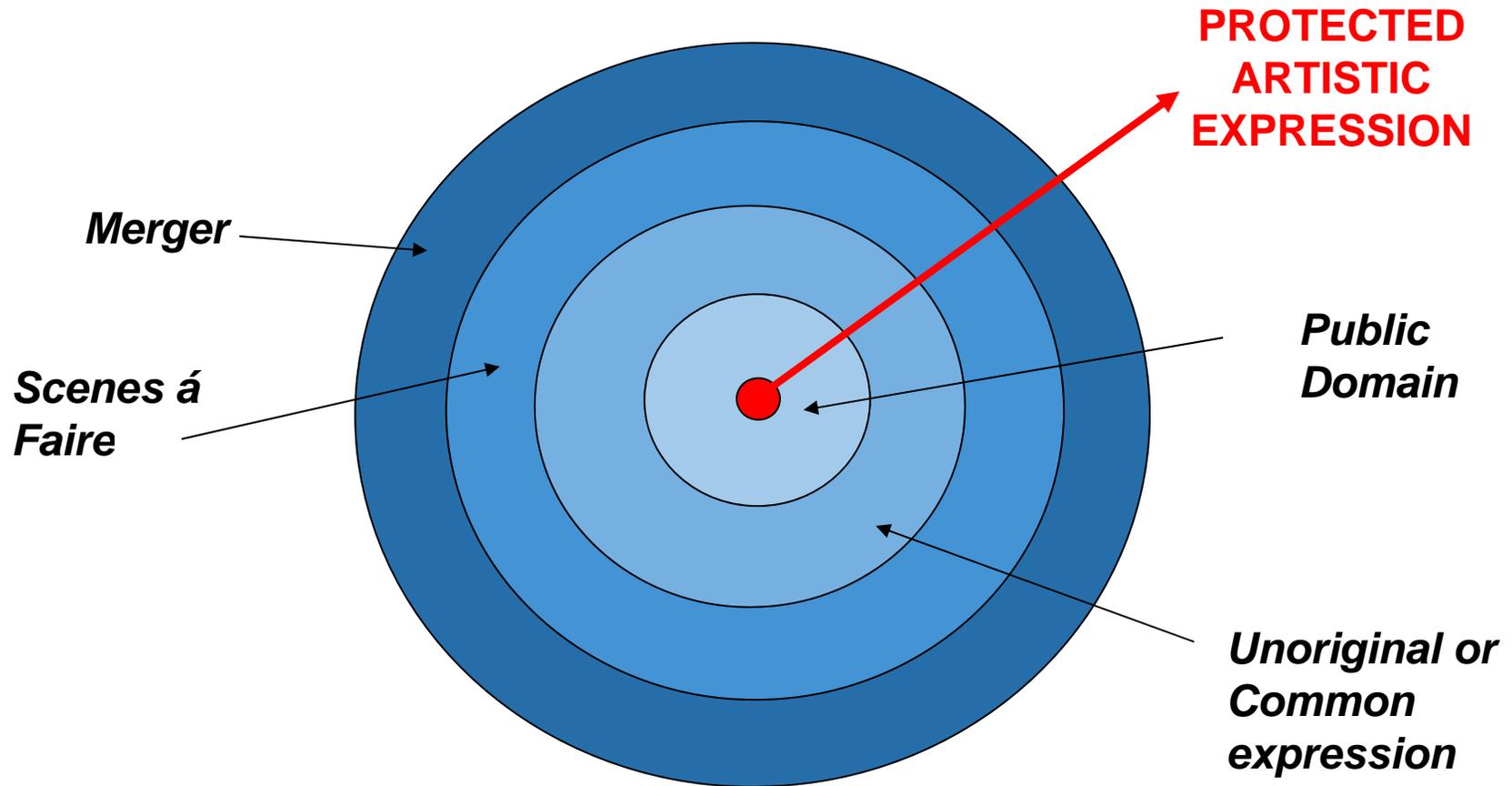
- For photographs:
 - Posing of subjects
 - Lighting
 - Shot angles
 - Selection of film and camera.

2. Apply Filters



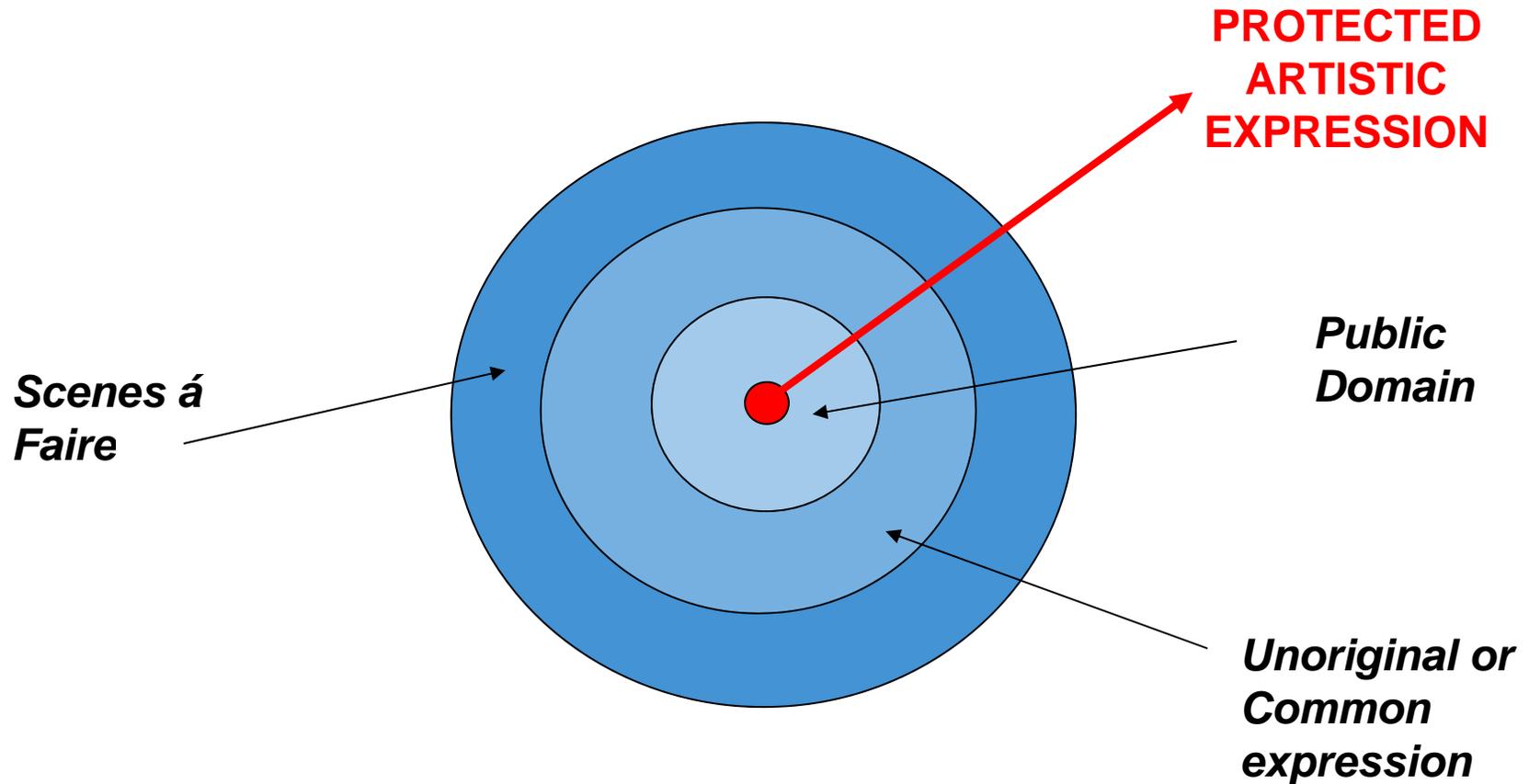
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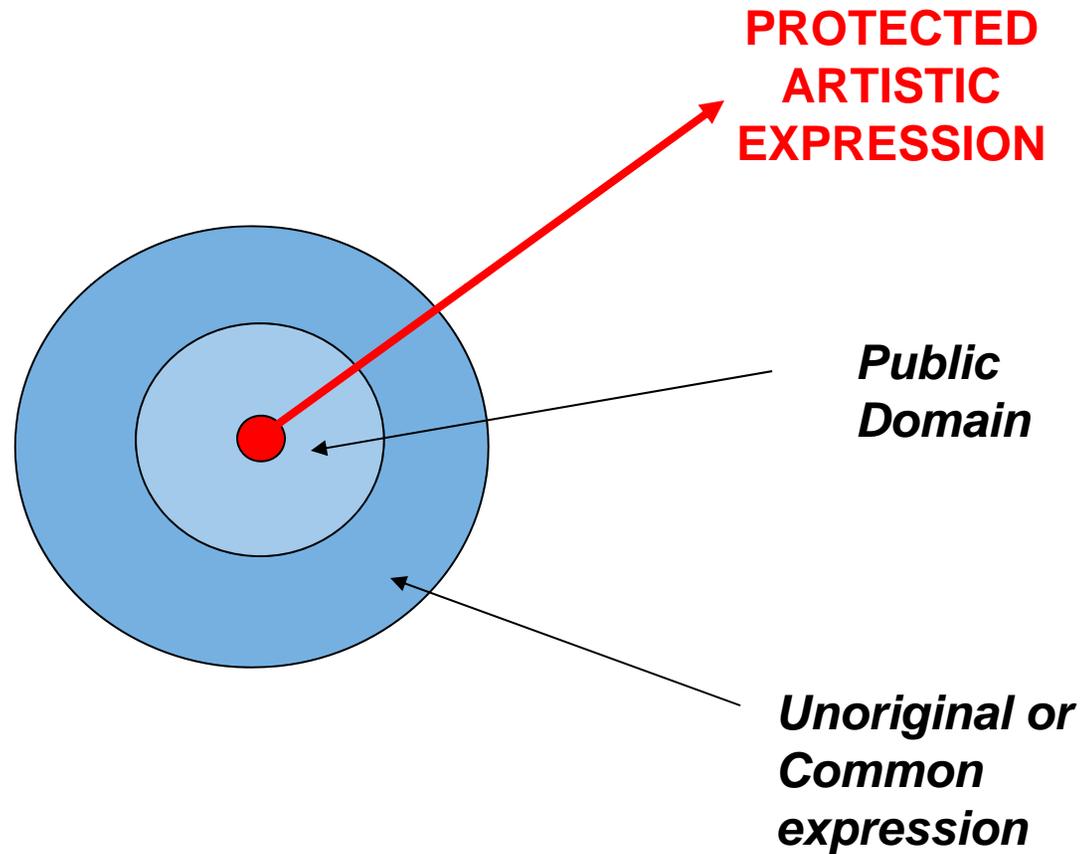
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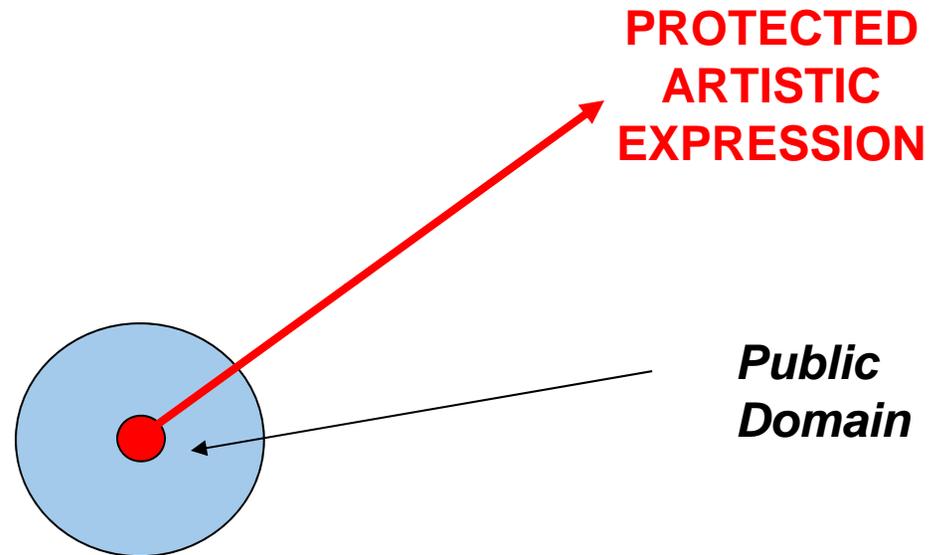
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2. Apply Filters



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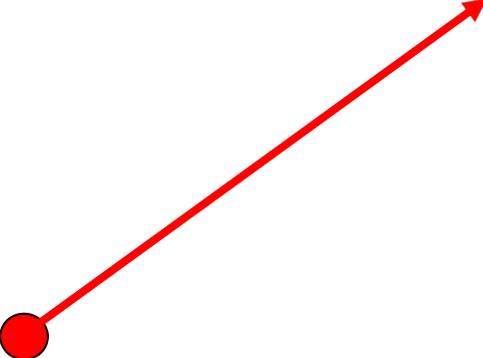
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2. Apply Filters

**PROTECTED
ARTISTIC
EXPRESSION**

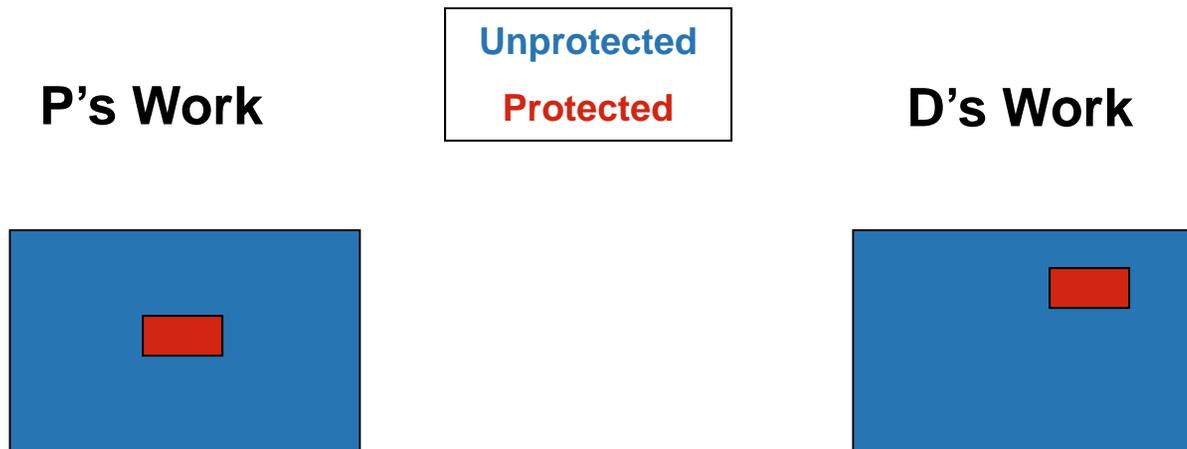


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3. Similarities Limited to Unprotected Aspects

Focus of attack:

Comparing works as a whole, most (or all) similarities are driven by unprotected aspects. The protectible aspects of plaintiff's work bear no similarity to the defendant's work.



3. Similarities Limited to Unprotected Aspects

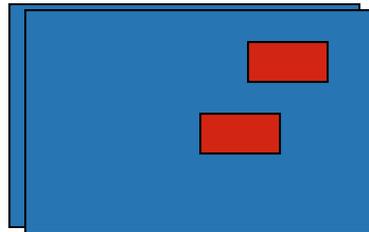
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P's Work



D's Work

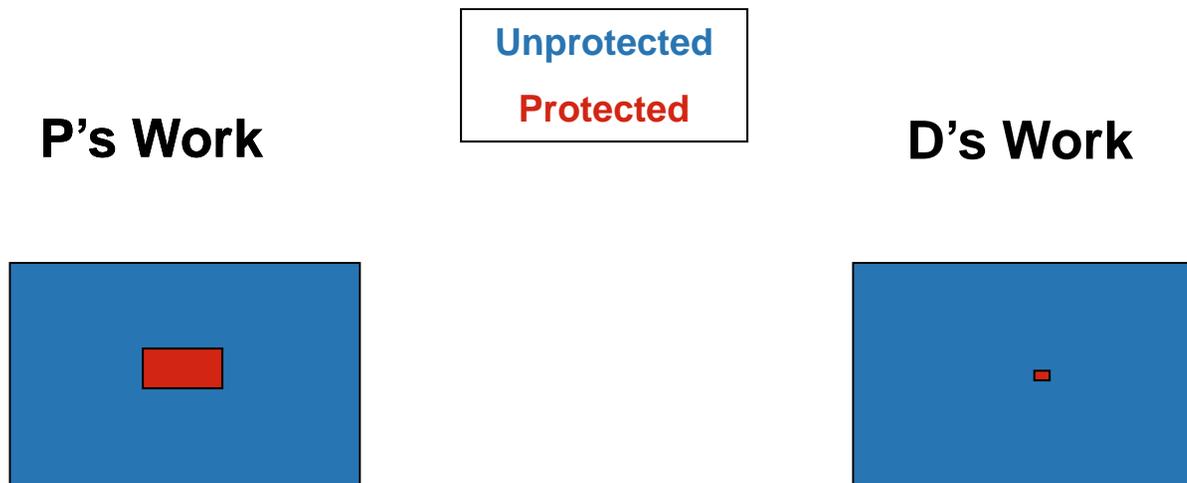


Copying limited to unprotected aspects

4. Similarity is De Minimis

Focus of attack:

Any similarity of protectible elements is not of a quality and/or quantity to amount to an improper or unlawful appropriation but is de minimis and of no consequence - either qualitatively or quantitatively - to the plaintiff's work.



4. Similarity is De Minimis

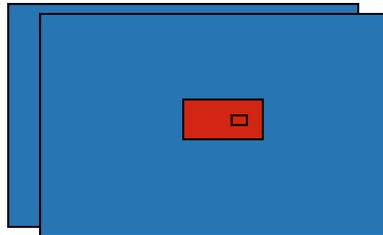
Focus of attack:

Any similarity of protectible elements is not of a quality and/or quantity to amount to an improper or unlawful appropriation but is de minimis and of no consequence - either qualitatively or quantitatively - to the plaintiff's work.

P's Work

Unprotected
Protected

D's Work



**Similarity is
not substantial**

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Practice Pointers

Build a Record for Filters Early

1. Scour the public domain

Focus client *ab initio* on the importance of identifying and collecting examples throughout the public domain with similar themes or elements.

2. Retrofit the work to fit the filters

Show via examples of practice in the applicable industry or genre that there are only a few ways that the idea is treated.

3. Obtain admissions from plaintiff or licensor of work

- Investigate plaintiff's own description of work via promotional materials/advertising/prior drafts or other versions of the work
- Depose plaintiff as to the source or inspiration for the work (Historical fact? Another work? Pop culture?)
- Depose plaintiff as to prevalence of particular elements in pop-culture/genre/industry

Experts

While generally (though not always) impermissible on issue of whether the similarity is “substantial,” can be useful to:

1. Identify the Constituent Elements

An expert can “dissect” the work into constituent elements appropriate for that type of work (e.g. a musical piece can be broken into melody/harmony, “hooks,” lyrics, bridges, percussive elements, etc.).

2. Support Filters

An expert can then root the identified elements in the context of the broader genre/culture to show that the plaintiff’s expression is not original or is merged with a particular idea.

3. Opine on similarities between “specialized” works

Where plaintiff claimed that defendant’s use of the phrase “Go [name], it’s your birthday” in defendant’s song infringed on Plaintiff’s song featuring the same phrase, defendant’s expert successfully testified that the phrase was a “hip hop chant” that was a “signature and long-standing feature of live performances of rap music” and not original to plaintiff (and thus, unprotectible). *Lil’ Joe Wein Music, Inc. v. Jackson*, 245 Fed. Appx. 873, 878 (11th Cir. 2007).

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An expert can then root the identified elements in the context of the broader genre/culture to show that the plaintiff’s expression is not original or is merged with a particular idea.

3. Opine on similarities between “specialized” works

For example, expert testimony on substantial similarity might be permitted in cases involving computer programs, see *Computer Assoc., Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 713-14 (2d Cir. 1992), or highly specialized musical arrangements. See *Dawson v. Hinshaw Music Inc.*, 905 F.2d 731, 736-38 (4th Cir. 1990).

Access Need not and Should not be Conceded

- A plaintiff's inability to prove access may be a fatal flaw to their case. But at the same time, questions of access often turn on witness credibility and other triable issues of fact
- Thus, defendants sometimes "concede" access on summary judgment in order to focus their efforts on "probative" and/or "substantial similarity"
- While this removes a material issue of fact, it might be dangerous (especially in the 9th Circuit) to "concede" access for all purposes, because of the "inverse ratio rule"

The “Inverse Ratio” Rule

While a strong showing of similarity may overcome a weak showing of access, some courts, notably the 9th Circuit, will apply the inverse of that rule (the “Inverse Ratio” rule), to permit a strong showing of access to compensate for a weaker showing of similarity:

“Under our case law, substantial similarity is inextricably linked to the issue of access. . . [and] **we require a lower standard of proof of substantial similarity when a high degree of access is shown.**”

Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485
(9th Cir. 2000) (internal citation omitted).

Make Strategic Concessions of Factual Issues

Rather than “conceding” access for all purposes (which might inadvertently ease plaintiff’s burden of showing probative similarity via the “inverse ratio” rule), make clear that motion is being made on issue of substantial similarity only, and that therefore, any factual issues relating to access or probative similarity are not material.

Extensive Discovery is Not Necessary

- At the outset of case, consider whether the lack of substantial similarity can be proven on the face of the works alone
- If so, and especially if actual copying is assumed *arguendo*, then a motion for summary judgment can be brought very early on, even prior to any discovery in the case

For example:

In a case alleging infringement of musical works, a court granted a stay of discovery to allow defendant to bring a summary judgment motion on the issue of substantial similarity because “the only evidence necessary for such a determination is (1) recordings of the songs in question, and (2) transcriptions of all of the lyrics in question.”

Prunté v. Univ. Music Group, 563 F. Supp. 2d 41 (D.D.C. 2008).

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For example:

A court granted summary judgment for defendant without discovery based on a side-by-side comparison of novels. “[N]either discovery nor expert evidence is needed, or even appropriate ... [because] Defendants have accepted, for purposes of their motions, Plaintiff’s assertions with regard to the only relevant potential factual disputes alive in the case: [access and probative similarity]. Discovery, therefore, would generate no facts material to the issues before the court.”

Dunn v. Brown, 517 F. Supp. 2d 541 (D. Mass. 2007).

Consider a Motion to Dismiss

If a strong case can be made on documentary evidence alone, consider a FRCP 12(b)(6) motion.

Present the court with documentary evidence via:

- A motion for judicial notice per Fed. R. Evid. 201

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For example, in dismissing an infringement claim regarding a television cooking show pursuant to FRCP 12(b)(6), one court took judicial notice of various common elements of a television cooking show, including that such shows typically feature a host, a celebrity guest, an interview, and a cooking segment. “[T]hese elements are generally known and can be verified simply by watching television for any length of time.” *Zella v. E.W. Scribbs Co.*, 529, F. Supp. 2d 1124, 1129 (C.D. Cal. 2007).

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- Attaching documents alleged in the complaint, central to the complaint, and/or whose authenticity no one questions (e.g., both of the works at issue)

“Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff’s complaint and are central to [the plaintiff’s] claim.” *Randolph v. Dimension Films*, 2009 WL 385437, at * 3 (S.D. Tex. 2009).

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- Attaching documents alleged in the complaint, central to the complaint, and/or whose authenticity no one questions (e.g., both of the works at issue)
- Attach documents for conversion into motion for summary judgment

Thank you!

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