



## 1 Nimmer on Copyright Author(s)

**Nimmer on Copyright**

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### § 13D.06 Probative Similarity<sup>†</sup>

#### [A] Setting the Inquiry in its Proper Context

##### [1] Coordinate with Access.

We have previously seen that indirect proof of actual copying consists of two sub-elements,<sup>1</sup> of which the first is access to the protected work.<sup>2</sup> We have now reached the other subelement of actual copying, which has been variously labeled in the past but which is best identified (for reasons that we will see presently) under the rubric “probative similarity.”<sup>3</sup> Briefly defined, that term refers to points of commonality between the parties’ works that give rise to a reasonable inference that plaintiff’s copyrighted work served as the source for defendant’s creation. (To clothe the parties with names, the investigation is whether defendant Devin, as a matter of historical fact, copied elements from plaintiff Penny’s creation.)

To revert to the chart setting forth the elements of an infringement claim, plaintiff bears the burden of establishing both *factual copying* (component ☐ E) and *improper appropriation* (component ☐ F, also known as *legal copying*.) The first requires proof, as a matter of historical fact, that Devin copied from Penny in the production of his own work.<sup>4</sup> In brief, the factfinder compares the two works in suit to examine their similarities—the presence of sufficient similarities between them allows the inference of factual copying, whereas the absence of sufficient similarities allows the opposite inference.

Bringing back Chart 11, the indirect evidence that constitutes this proof investigates two aspects. One is access (component ☐ I), which has been discussed at length above.<sup>5</sup> The other is *probative similarity* (component ☐ J), the matter currently under examination. The two work in tandem—a sufficient combination of access together with points of commonality of a distinctive nature allow the court to draw the requisite inference of factual copying.<sup>6</sup>

#### CHART 11

<sup>†</sup> This chapter is co-authored by Shyamkrishna Balganesh (§§ 13D.01–13D.09) and by Xiyin Tang (§§ 13D.10–13D.40).

<sup>1</sup> See [§ 13D.02](#) *supra*.

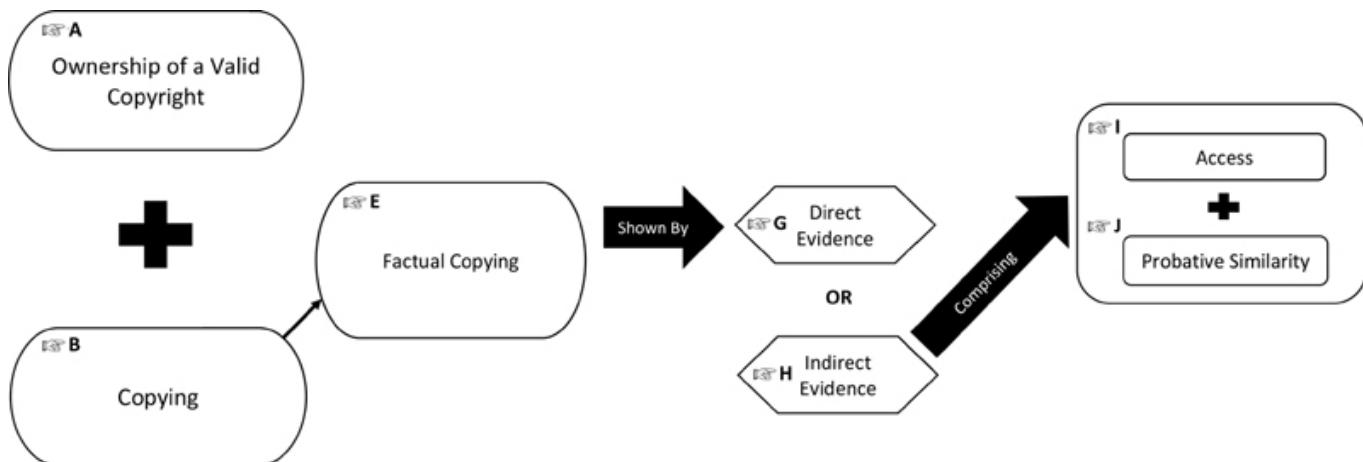
<sup>2</sup> See [§ 13D.05](#) *supra*.

<sup>3</sup> See [§ 13D.06\[A\]\[2\]](#) *infra*.

<sup>4</sup> See [§ 13D.03](#) *supra*.

<sup>5</sup> See [§ 13D.05](#) *supra*.

<sup>6</sup> See [Coquico, Inc. v. Rodriguez-Miranda](#), 562 F.3d 62, 67 (1st Cir. 2009); [Armour v. Knowles](#), 512 F.3d 147, 152 (5th Cir. 2007); [Positive Black Talk Inc. v. Cash Money Recs., Inc.](#), 394 F.3d 357, 368 (5th Cir. 2004); [Jorgensen v. Epic/Sony Recs.](#), 351 F.3d 46, 56 (2d Cir. 2003); [Bridgmon v. Array Sys. Corp.](#), 325 F.3d 572, 576 (5th Cir. 2003); [Repp v. Webber](#), 132 F.3d 882, 889 n.1 (2d Cir. 1997); [Batiste v. Lewis](#), 976 F.3d 493, 502 (5th Cir. 2020).



Given its pairing with access, probative similarity, standing alone, cannot generate the requisite inference of factual copying. In other words, the presence of similarities probative of copying allows Penny to move forward only if she can, in addition, show that Devin had access to her work. Consequently, absent proof of access, plaintiff's case fails. Nonetheless, there is an extreme case at the margin—it arises when the similarity between the two works is so striking as to rule out all other explanations other than factual copying. The next section turns to that doctrine of "striking similarity."<sup>7</sup>

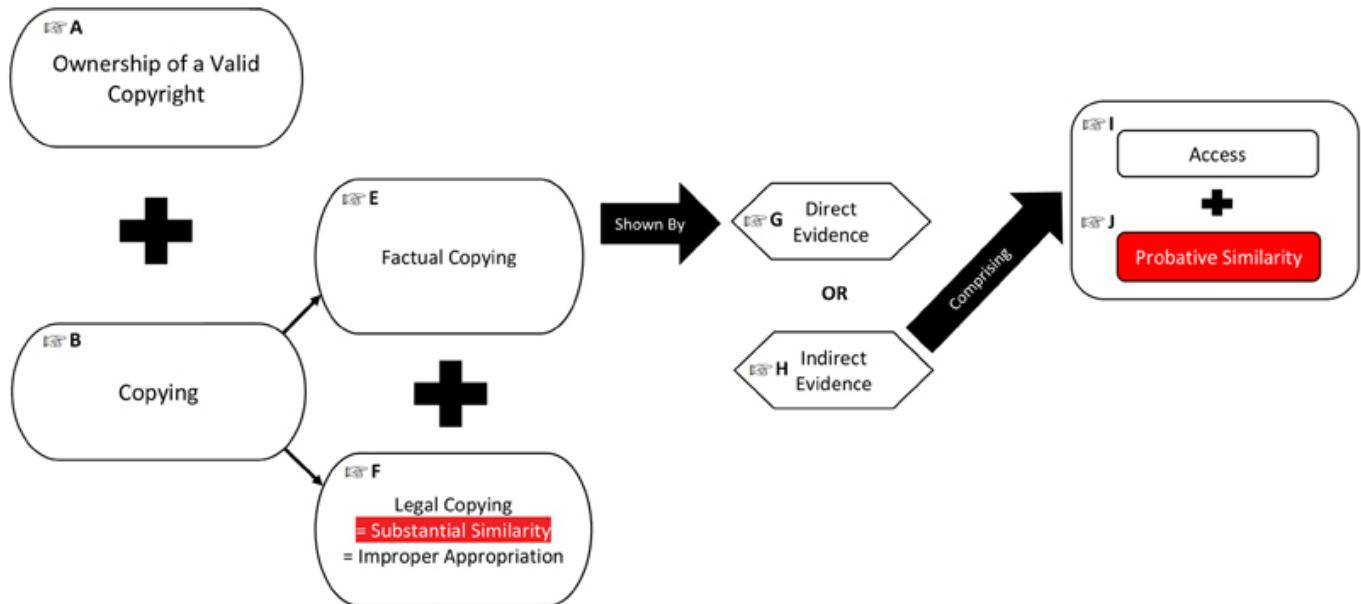
## [2] Distinguished from "Substantial Similarity."

There is an unfortunate commonality of the term "similarity" on two elements of the chart, as Chart 12 highlights. The current focus is on "probative similarity" (component  $\Rightarrow$  J) as one ingredient of *factual copying*, whereas the distinct element of *legal copying* is alternatively known as "substantial similarity"<sup>8</sup> (component  $\Rightarrow$  F). That cross-over has given rise to endless confusion, given that the two "similarities" are themselves fundamentally dissimilar.

## CHART 12

<sup>7</sup> See [§ 13D.07](#) *infra*.

<sup>8</sup> See, e.g., [Arnstein, 154 F.2d at 468](#); [Peters v. West, 692 F.3d 629, 633 \(7th Cir. 2012\)](#); [Kay Berry, Inc. v. Taylor Gifts, Inc., 421 F.3d 199, 208 \(3d Cir. 2005\)](#); [Laureyssens v. Idea Grp., Inc., 964 F.2d 131, 140 \(2d Cir. 1992\)](#).



Later sections will map the large terrain of copyright law that goes by the name *substantial similarity* (alternatively called *improper appropriation*), which refers to *copying as a legal matter*.<sup>9</sup> That investigation arises only after plaintiff has already vaulted the current hurdle.<sup>10</sup> In other words, Penny must first establish that Devin copied from her work as a factual matter, before going further to argue that the points in common are so substantial as to entail improper appropriation. The matter currently under investigation therefore qualifies as a prerequisite for that later aspect to ripen. Critical as this distinction is, numerous courts have elided it.

Even before passage of the current Act, the Third Circuit identified this confusion in terminology.<sup>11</sup> Its opinion correctly noted that courts at the time used the same phrase “substantial similarity” to refer to those two separate types of similarity:

[S]ubstantial similarity to show that the original work has been copied is not the same as substantial similarity to prove infringement. ... While “[r]ose is a rose is a rose is a rose,” substantial similarity is not always substantial similarity.<sup>12</sup>

Sadly, few courts heeded those words of caution; instead, conflation of the two forms of similarity<sup>13</sup> continued unabated.<sup>14</sup>

<sup>9</sup> See Part II *infra*.

<sup>10</sup> “After” is a relative term here—it refers to logic, rather than judicial practice. Courts can always focus on a “later” issue to the exclusion of all else and thereby forestall confrontation with “earlier” issues. For instance, they could rule in defendant’s favor based on fair use without first investigating whether plaintiff could establish all the elements of her *prima facie* case. By the same token, they could rule in defendant’s favor based on lack of improper appropriation without first investigating whether plaintiff could establish the element of copying as a factual matter.

<sup>11</sup> Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904 (3d Cir. 1975).

<sup>12</sup> *Id. at 907.*

<sup>13</sup> Chart 16 below will present the matter in graphical terms. See § 13D.08[D][1] *infra*.

<sup>14</sup> Prominent examples include *Kamar Int'l, Inc. v. Russ Berrie & Co.*, 657 F.2d 1059, 1062 (9th Cir. 1981); *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 558 F.2d 1090, 1092 (2d Cir. 1977). The Second Circuit even criticized the use of the term “improper appropriation” in place of “substantial similarity.” *Ideal Toy Corp. v. Fab-Lu Ltd. (Inc.)*, 360 F.2d 1021, 1023 n.2 (2d Cir. 1966) (*Treatise cited*).

Recognizing this unfortunate reality, Professor Alan Latman proposed maintaining the necessary distinction between these two forms of similarity by denominating the one accompanying the inquiry into actual copying as “probative similarity,” while retaining the term “substantial similarity” for the other, *i.e.*, improper appropriation.<sup>15</sup> He explained the rationale for this terminology as serving to “remind[] us that there may be other facts probative of copying” thus allowing the phrase to “serve more than a semantic purpose.”<sup>16</sup> Following publication of that salutary article, this treatise endorsed the proposed change in nomenclature, and has incorporated it since. Courts around the country have followed suit.<sup>17</sup>

As a matter of nomenclature, “probative similarity” remains the preferred usage, allowing courts to distinguish the inquiry into historical evidence of factual copying from the subsequent assessment of its propriety under “substantial similarity.”<sup>18</sup> As discussed below, the probative nature of the assessment allows courts to engage in a dissection of the work and make use of expert testimony,<sup>19</sup> enabling them to rule out alternative explanations for similarity.<sup>20</sup>

## **[B] Nature of Probative Similarity**

Now that we have seen where probative similarity *fits* in the context of a *prima facie* case of copyright infringement,<sup>21</sup> it is time to focus on what it *is*.

### **[1] Circumstantial Evidence.**

To perform the requisite investigation, “probative similarity” tasks the factfinder with examining both works in suit as a whole, in order to assess the provenance and degree of similarity between them. This inquiry into historical fact is necessarily inferential.<sup>22</sup> As such, it is an exercise in circumstantial evidence<sup>23</sup>—the question being whether the demonstrated similarities give rise to an appropriate inference that defendant based his work on plaintiff’s work as a predecessor.

Similarities between works qualify as probative of factual copying when, in the normal course of events, they would not be expected to arise independently in the two works. Thus, probative similarity combined

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<sup>15</sup> Alan Latman, *Probative Similarity” as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement*, [90 Colum. L. Rev. 1187, 1204 \(1990\)](#).

<sup>16</sup> *Id.* at 1204.

<sup>17</sup> See [Soc'y of Holy Transfiguration Monastery, Inc. v. Gregory](#), 689 F.3d 29, 49 (1st Cir. 2012) (Treatise quoted); [Johnson v. Gordon](#), 409 F.3d 12, 18 (1st Cir. 2005) (Treatise quoted); [Bridgmon v. Array Sys. Corp.](#), 325 F.3d 572, 576 (5th Cir. 2003) (Treatise cited); [Dam Things from Denmark, a/k/a Troll Co. ApS, v. Russ Berrie & Co., Inc.](#), 290 F.3d 548, 562 n.20 (3d Cir. 2002) (Treatise quoted); [Laureyssens v. Idea Grp., Inc.](#), 964 F.2d 131, 140 (2d Cir. 1992) (Treatise quoted).

<sup>18</sup> 8

To preserve the distinction between these two concepts, we will follow the Second Circuit’s lead and use the term “probative similarity” to refer to the degree of similarity necessary to support an inference of actual copying and the term “substantial similarity” to refer to the test for wrongful copying or unlawful appropriation.

[Design Basics, LLC v. Signature Constr., Inc.](#), 994 F.3d 879, 888 (7th Cir. 2021).

<sup>19</sup> See [§ 13D.06\[B\]\[3\] infra](#).

<sup>20</sup> See [§ 13D.06\[B\]\[4\] infra](#).

<sup>21</sup> See [§ 13D.06\[A\] supra](#).

<sup>22</sup> For those rare cases in which there is direct evidence of factual copying, the issue of probative similarity does not ripen. See [§ 13D.04 supra](#).

<sup>23</sup> See [§ 13D.05\[A\] supra](#).

with proof of access allows plaintiff to proceed with her case. Its absence should lead to dismissal of the case, whereas its presence<sup>24</sup> paves the way for plaintiff to go further by attempting to prove improper appropriation—at which point defendant may concomitantly raise affirmative defenses.<sup>25</sup>

Consider a plaintiff's complaint that the drum beat in its work "Zimba Ku" was the subject of defendant's copying into his own song "Price Tag."<sup>26</sup> The court examined whether the similarities between the two works would allow an inference of factual copying by defendant, once access was shown to exist. Breaking the work down into its constituent parts, defendant argued that each element of plaintiff's drumbeat was "trite," "unremarkable" and commonplace enough to have been independently created, thus negating any inference of factual copying.<sup>27</sup> The court rejected that stance, concluding instead that, even if the individual elements were each independently insufficient to generate an inference of copying, when viewed "in combination" they were of sufficient magnitude to allow an inference that defendant copied from plaintiff.<sup>28</sup> That finding, in essence, constitutes *probative similarity*.

## [2] Division into Parts.

Even though some courts draw an inference of probative similarity only after a comparison of the works as a whole, it does not follow that the requisite similarity needs to extend to the whole of those works. The matter at hand is circumstantial evidence.<sup>29</sup> That evidence may derive from the whole or from discrete parts.

Copying arises as a reasonable inference when "the infringing work copies *something* from the copyrighted work."<sup>30</sup> One court thus framed the test as asking "whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work."<sup>31</sup>

What about dissimilarities between parts of the two works in suit? When the similarity between the parties' works is extensive, then other dissimilarities do not prevent the conclusion that the existing similarities are probative of copying. *Peel & Co., Inc v. The Rug Market* illustrates this approach.<sup>32</sup> Plaintiff alleged infringement of its rug design by a competitor, claiming that its design was widely disseminated in the domestic rug trade. On the question of probative similarity, the district court had compared plaintiff's design against defendant's rug and emphasized the differences between them to conclude that "no reasonable person would mistake these two rugs as being the same ... [since they] obviously do not have the same aesthetic appeal."<sup>33</sup> The Fifth Circuit reversed on probative similarity. Holding that "[t]he rugs have the same

<sup>24</sup> The inference that arises from plaintiff's proof of access plus probative similarity suffices to defeat summary judgment for defendant on the ground that he independently created his own work. Nonetheless, it does not bind the factfinder. A jury presented with the requisite proof of access plus probative similarity could still credit defendant's testimony to conclude that, as a matter of historical fact, he actually did independently create his own work. See [§ 13D.05\[B\]\[1\] supra](#).

<sup>25</sup> See [§ 13D.02\[C\]\[2\] supra](#).

<sup>26</sup> [New Old Music Grp., Inc. v. Gottwald, 122 F. Supp. 3d 78, 82–84 \(S.D.N.Y. 2015\)](#).

<sup>27</sup> [Id. at 86](#).

<sup>28</sup> [Id. at 86](#).

<sup>29</sup> See [§ 13D.05\[A\] supra](#).

<sup>30</sup> [Ringgold v. Black Ent. Television, Inc., 126 F.3d 70, 75 \(2d Cir. 1997\)](#) (emphasis added).

<sup>31</sup> [Blakeman v. The Walt Disney Co., 613 F. Supp. 2d 288, 304 \(E.D.N.Y. 2009\)](#) (Treatise quoted).

<sup>32</sup> [238 F.3d 391 \(5th Cir. 2001\)](#).

overall proportion, [] generally employ the same color schemes ... [and] use the same number of repeating panels, each of which features shaded triangles and a central floral medallion" it concluded that, because "reasonable laymen ... could differ as to whether these two rugs are probatively similar," the district court should not have resolved the question as a matter of law.<sup>34</sup> Accordingly, it remanded to turn the question over to the factfinder, as it hinged on disputed questions of material fact.<sup>35</sup>

### [3] Aspects of Proof

#### **[a] Focus on Actual Works in Suit.**

To belabor the obvious, the similarities that are pertinent here are those that exist between plaintiff's actual work and defendant's allegedly infringing copy. The requisite similarity may not be shown by an analysis that alters the actual sequence or construction of plaintiff's work in order to achieve a juxtaposition that makes for greater similarity with defendant's work.<sup>36</sup> Examples of prohibited devices here would include compiling "widely scattered passages"<sup>36.1</sup> or allowing plaintiff to introduce his own "voiceover" version of defendant's movie.<sup>36.2</sup>

#### **[b] Lists of Similarities.**

By the same token, proof of probative similarity does not arise via a "random similarities scattered throughout the work,"<sup>36.3</sup> notwithstanding how popular such submissions have proven to be.<sup>36.4</sup> Acknowledging that cherry-picked<sup>36.5</sup> lists of similarities are sometimes used for "illustrative

<sup>33</sup> [No. CIV.A. 98-2376, 1999 U.S. Dist. LEXIS 14632, at \\*11 \(E.D. La. Sept. 17, 1999\).](#)

<sup>34</sup> [238 F.3d at 397.](#)

<sup>35</sup> [Id. at 397–98.](#)

<sup>36</sup> [Warner Bros., Inc. v. American Broad. Cos., 654 F.2d 204 \(2d Cir. 1981\) \(Treatise quoted\).](#) See [Arnstein v. Twentieth Century-Fox Film Corp., 52 F. Supp. 114 \(S.D.N.Y. 1943\).](#)

<sup>36.1</sup> [McMahon v. Prentice-Hall, Inc., 486 F. Supp. 1296 \(E.D. Mo. 1980\).](#)

<sup>36.2</sup> [Walker v. Time Life Films, Inc., 784 F.2d 44, 52 \(2d Cir.\), cert. denied, 476 U.S. 1159 \(1986\).](#)

<sup>36.3</sup> [Cavalier v. Random House, Inc., 297 F.3d 815, 825 \(9th Cir. 2002\); Leigh v. Warner Bros., Inc., 212 F.3d 1210, 1215 \(11th Cir. 2000\); Olson v. National Broad. Co., 855 F.2d 1446, 1450 \(9th Cir. 1988\); Litchfield v. Spielberg, 736 F.2d 1352, 1356 \(9th Cir. 1984\); Comins v. Discovery Comms., Inc., 200 F. Supp. 2d 512, 518 \(D. Md. 2002\).](#) See [Nicassio v. Viacom Int'l, Inc., 309 F. Supp. 3d 381, 395 \(W.D. Pa. 2018\)](#), aff'd unpub., [776 Fed. Appx. 761 \(3d Cir.\), cert. denied, 140 S. Ct. 630 \(2019\)](#) ("random scattershot" similarities); [Dickerson v. WB Studio Enters., Inc., 276 F. Supp. 3d 167, 173 \(S.D.N.Y. 2017\)](#).

<sup>36.4</sup> For a particularly egregious list of single words, see [Sherman v. Jones, 457 F. Supp. 2d 793, 795, 797 \(E.D. Mich. 2006\)](#) (rejecting plaintiff's prayer for \$100 million in damages plus reimbursement of medical expenses). One case, lamenting that "plaintiff's submission has frustrated the Court and has obfuscated the issues," denied her case *in toto* (and appended two dozen pages of detailed charts to show why). [McDonald v. K-2 Indus., Inc., 108 F. Supp. 3d 135, 142–42, 148–71 \(W.D.N.Y. 2015\).](#)

<sup>36.5</sup> [Nobile v. Watts, 289 F. Supp. 3d 527, 534 \(S.D.N.Y. 2017\).](#) See [Cy Wakeman, Inc. v. Nicole Price Consulting, LLC, 284 F. Supp. 3d 985, 991 \(D. Neb. 2018\).](#)

purposes,”<sup>36.6</sup> many courts are of the opinion they are “inherently subjective and unreliable.”<sup>36.7</sup> Layered on top is the endemic problem of exaggerating (or even inventing) supposed similarities.<sup>36.8</sup>

### **[c] Expert Testimony.**

The further question arises who is competent to testify as to these similarities. It has been held not an abuse of discretion to permit plaintiff himself to opine as to the similarities between his and defendant’s works.<sup>36.9</sup>

The question often arises whether a feature found in both works is attributable to plaintiff rather than to the genre (or field) as a whole. On that score, plaintiff, as author of the work in suit, may not be in a position to offer cognizable testimony. For this issue, courts regularly admit the testimony of experts. The analysis then often comes down to determining which of the two competing expert reports is more convincing on the assessment of similarity.<sup>36.10</sup>

This investigation, in turn, requires the court to develop an understanding of the subject matter underlying the works, along with the available techniques and forms of creativity therein. When the subject matter at bar is technical, courts may need to avail themselves of expert testimony in order to assess the likelihood of copying *versus* other factors. Those experts might be called upon to dissect the work into its constituent parts, for instance, as part and parcel of “illuminating whether similarities between the two works are more likely due to copying or”<sup>36.11</sup> to a non-infringing alternative.<sup>36.12</sup> Probative similarity can often entail a fact-intensive inquiry.

### **[4] Inadequacy of Alternative Explanations.**

As explicated above, probative similarity, on the positive side, consists of points of commonality that provide circumstantial evidence of derivation.<sup>37</sup> If Penny writes a country song that features the lyrics “Babylonian revenge sculpture,” the confluence in Devin’s song of the phrase “vengeance from the carvings of ancient Babylon and Sumer,” standing alone, evinces circumstantial evidence that Devin originated part of his composition from Penny, sufficient to constitute probative similarity.<sup>38</sup>

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<sup>36.6</sup> *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1984) (citation omitted). See *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 52 (2d Cir.) (“it might be an abuse of discretion to bar a plaintiff from using [a list of similarities] in arguing on a summary judgment motion”), cert. denied, 476 U.S. 1159 (1986).

<sup>36.7</sup> The full passage reads as follows:

While we have relied on such lists of similarities in the past for “illustrative purposes,” they are inherently subjective and unreliable. We are particularly cautious where, as here, the list emphasizes random similarities scattered throughout the works.

*Litchfield*, 736 F.2d at 1356. Many cases have quoted that passage, as reflected in N. 36.4 *supra*.

<sup>36.8</sup> An example is *Hajim v. Endemol Shine Uk*, 545 F. Supp. 3d 643, 650 (N.D. Ill. 2021).

<sup>36.9</sup> See *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981).

<sup>36.10</sup> See Shyamkrishna Balganesh & Peter S. Menell, *The Use of Technical Experts in Software Copyright Cases: Rectifying the Ninth Circuit’s “Nutty” Rule*, 35 *Berkeley Tech. L.J.* 663 (2020).

<sup>36.11</sup> *New Old Music Grp., Inc. v. Gottwald*, 122 F. Supp. 3d 78, 85 (S.D.N.Y. 2015).

<sup>36.12</sup> There is a doctrine of patent law that limits damages when a non-infringing alternative is available. The United States Court of Federal Claims has declined to apply that rule in the copyright arena. See 4DD *Holdings, LLC v. United States*, 169 Fed. Cl. 164, 179 (2023).

<sup>37</sup> See § 13D.06[B][1] *supra*.

<sup>38</sup> The discussion will flesh out the operative facts, in turn causing different inferences to arise. See § 13D.06[B][4][a] *infra*.

We can equally approach the exercise from the negative side—when the facts fail to exhibit circumstantial evidence of derivation, then probative similarity is absent. That failure may stem from multiple sources.

**[a] Trite Expression.**

The first index that probative similarity is lacking may arise from the fact that the points of commonality inhere in trite expression. Let us change the operative facts such that Penny's country song mentions not Mesopotamian statuary but instead forlorn love, bars, and jukeboxes. To the extent that Devin releases his own rival song comprising references to jukeboxes in taverns, along with jilted relationships, the two songs bear some points in common. Does it rise to the level of probative similarity?

The answer is negative. Countless songs in the country genre recount tales of woe from rejected lovers, as recounted over the mechanical record-player in some saloon. The overlap in that regard does not evidence derivation—it simply places both into the same genre.<sup>39</sup> Elements of similarity that are so common that they might indeed have been independently created<sup>40</sup> by both plaintiff and defendant are not probative of factual copying.<sup>41</sup>

On the other hand, if the points of commonality exceed those trite formulations, the opposite could pertain. Consider the actual case of plaintiff's lyrics, "Prop Me Up Beside the Jukebox (If I Die)" allegedly infringed by defendant's, "Lay Me Out By the Jukebox When I Die."<sup>42</sup> In that variant, the circumstance could be fairly evaluated to evidence derivation, so probative similarity may exist.<sup>43</sup>

**[b] Common Prior Sources.**

Now let us tweak the facts further to posit that, a decade before the release of plaintiff's song, a third party authored his own country song featuring the refrain, "When I Die Just Put My Corpse Right Atop the Juke." If defendant copied from that earlier composition, then plaintiff's case fails. The operative legal proposition is that a prior common source can negate the existence of probative similarity.<sup>44</sup> In other words, defendant may be an outright copyist—but if he copied from a source other than *plaintiff*, then her case collapses.<sup>44.1</sup>

**[c] Independent Creation.**

The lessons thus far fall on both sides of the ledger. On the one hand, if the resemblance between Penny's and Devin's works is such as to constitute circumstantial evidence of copying, then probative similarity is present.<sup>45</sup> On the other, if those points of similarity are consistent with both

<sup>39</sup> A separate discussion ventilates the doctrine of scenes a faire in the context of substantial similarity. See [§ 13.03\[B\]\[4\]](#) *supra*. The same logic at work there negates the presence of probative similarities in the instant context.

<sup>40</sup> For more on independent creation, see [§ 13D.06\[B\]\[4\]\[c\]](#) *infra*.

<sup>41</sup> See [New Old Music Grp., Inc. v. Gottwald](#), 122 F. Supp. 3d 78, 86 (S.D.N.Y. 2015); [Hogan v. DC Comics](#), 983 F. Supp. 82, 86 (N.D.N.Y. 1997).

<sup>42</sup> See [Ellis v. Diffie](#), 177 F.3d 503 (6th Cir. 1999).

<sup>43</sup> In the actual case, plaintiff went further to allege striking similarity—which the opinion deemed overreaching. [Id. at 505](#). (*Treatise cited*). See [§ 13D.07](#) *infra*.

<sup>44</sup> We will explore, in a subsequent section, a case deeply investigating prior common sources. See [§ 13D.06\[B\]](#) *infra*.

<sup>44.1</sup> We previously saw an example of this phenomenon. See situation (ii) in [§ 13D.05\[B\]\[1\]](#) *supra*.

parties having arrived at the same trite formulations or both having copied from a common prior source, then it is absent.<sup>46</sup> The point is not to exonerate Devin from the charge of *copying* per se—it is to inquire whether he copied specifically from Penny.<sup>47</sup> If not, her infringement case cannot proceed.

### **[i] Two Distinct Types.**

As an analytic matter, the opposite of factual copying is independent creation. In other words, if Devin created his work independently from Penny, then she is unable to demonstrate copying as a factual matter and the case ends. Within that realm, there are two possibilities:

- First, just as Penny had a spark of creativity that animated her work, so Devin may have been similarly kissed by the muses. Given that the quantum of creativity needed to obtain protection is low, Penny may have simply put together several pedestrian components to achieve copyright protection.<sup>48</sup> It would not be surprising for Devin to alight independently on those same elements. This form of independent *creation* places emphasis on the latter word—Devin was creative in the sense that all authors must imbue some creativity into their works.
- Second, maybe Devin was actually not creative in the slightest. Nonetheless, his rank copying may have turned for inspiration to sources other than Penny. This form of *independent creation* places emphasis on the former word—Devin was not at all dependent on Penny, rendering her unable to prove her *prima facie* case.

In terms of distinguishing those two poles, the considerations that we have set forth above are illustrative—triteness leads to the first form of independent creation, prior sources to the second. The facts of reported cases illustrate the spectrum.

### **[ii] Emphasis on Defendant's Creativity.**

Starting with the first form, consider *Procter & Gamble Co. v. Colgate-Palmolive Co.*, in which a toothpaste manufacturer alleged that its competitor infringed the copyright in its commercials.<sup>49</sup> Both parties' commercials demonstrated the effect of its toothpaste on teeth.<sup>50</sup> Defendant's involved taking two seashells, brushing only one with its toothpaste, and then submerging both in acid. After both shells were removed and scraped with dental picks, the one treated with defendant's product was shown to remain hard whereas the other crumbled.<sup>51</sup> Plaintiff alleged infringement of its previous commercial portraying eggs instead of seashells in essentially the same demonstration. After the district court granted summary judgment against plaintiff, the Second Circuit affirmed on the basis of independent creation:

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<sup>45</sup> See [§ 13D.06\[B\]\[1\] supra](#).

<sup>46</sup> See [§ 13D.06\[B\]\[4\]\[a\]–\[b\] supra](#).

<sup>47</sup> To the extent that Devin copied from a third party independent of Penny, then she is unable to show that he copied from her, so the *prima facie* case fails. See [§ 13D.06\[B\]\[4\]\[c\]\[iii\] infra](#).

<sup>48</sup> See [§ 2.01\[B\]\[1\] supra](#).

<sup>49</sup> [199 F.3d 74 \(2d Cir. 1999\)](#). Disclosure should be made that this writer participated in the appeal on behalf of the victorious defendant.

<sup>50</sup> [Id. at 75](#).

<sup>51</sup> [Id. at 76](#).

In this case, the creativity (if any) at issue consisted largely of selecting elements from the public domain to express a specific idea (that fluoride protects teeth against acid attack) in the most efficient way possible. Given the model of the public domain experiments, and the relatively restrictive medium of the television commercial, only so many choices existed. As [the district court] recognized, this circumstance strengthened the inference that similarities between the egg and seashell demos were attributable to independent creation rather than copying.<sup>52</sup>

In this context, we revert to the Fifth Circuit's resolution of *Peel & Co., Inc v. The Rug Market*.<sup>53</sup> The district court granted summary judgment to plaintiff on the basis that the similarity was insufficient to be probative of copying, believing that defendant likely designed its rug "on its own accord."<sup>54</sup> That resolution implicitly accepted that independent creation could have accounted for the similarity. The Fifth Circuit's reversal, by contrast, held that the factfinder could treat the similarity as sufficient to infer copying,<sup>55</sup> which would displace independent creation.<sup>56</sup>

***[iii] Emphasis on Independence from Plaintiff's Efforts.***

On the other side of the ledger, consider *Johnson v. Gordon*.<sup>57</sup> Plaintiff songwriter claimed that defendants had unlawfully copied parts of his musical composition to produce their own successful song.<sup>58</sup> The First Circuit affirmed grant of summary judgment to defendant.<sup>59</sup> Examining the competing expert reports<sup>60</sup> that had sought to assess the similarities between the works and explain them as alternatively either representing an appropriation or a derivation from a common source, the court rejected the testimony from plaintiff's expert:

Relationship does not necessarily breed similarity, and the plaintiff has offered no support for the proposition that musically related but distinct melodic fragments may give rise to an inference of actual copying. There is no facial similarity between the melodies of the relevant segments as they are written. The most that can be said is that the two segments bear some relation to one another within a finite world of melodies. Given the limited musical vocabulary available to composers, this is far from enough to support an inference of actual copying.<sup>61</sup>

Although countenancing the existence of some similarity between the works, the court was unwilling to treat it as probative of copying specifically from plaintiff.

**[C] Scope of Comparison**

<sup>52</sup> [Id. at 78.](#)

<sup>53</sup> [238 F.3d 391 \(5th Cir. 2001\).](#) See [§ 13D.06\[B\]\[2\] supra.](#)

<sup>54</sup> [238 F.3d at 398.](#)

<sup>55</sup> For that inference to arise, of course access also had to be present. See [§ 13D.04](#) *supra*.

<sup>56</sup> [238 F.3d at 398.](#)

<sup>57</sup> [409 F.3d 12 \(1st Cir. 2005\).](#)

<sup>58</sup> [Id. at 14–15.](#)

<sup>59</sup> [Id. at 16.](#)

<sup>60</sup> See [§ 13D.06\[B\]\[3\]](#) *supra*.

<sup>61</sup> [409 F.3d at 22.](#)

### [1] The Admixture of Unprotected Content

Courts have generally converged in their understanding of the focus of the inquiry into probative similarity and its independence from substantial similarity or improper appropriation.<sup>62</sup> Nevertheless, one significant disagreement that persists relates to the appropriate scope of the comparison. Specifically, the question is whether that comparison should examine only protected elements of plaintiff's work or instead proceed as an overall comparison of the two works, including unprotected components. The disagreement has received little attention from courts and commentators.

Starting first with the separate inquiry into improper appropriation, the *substantial similarity* step of the infringement analysis focuses only on the protected elements of plaintiff's work that defendant copied.<sup>63</sup>

Because it would be illogical to render defendant's copying of *unprotected* content actionable, that step limits itself to an assessment of the propriety of the defendant's copying of protected elements. Indeed, the logic of this proposition is embodied in the Supreme Court's observation "Not all copying ... is copyright infringement."<sup>64</sup> Copying, as such, is unproblematic—it crosses the line only when that copying relates to protected expression.

Probative similarity, on the other hand, poses a question of circumstantial evidence, rather than an assessment of actionability.<sup>65</sup> For that reason, there is no reason to constrain it in the same fashion. Instead, it is appropriate to consider circumstantial evidence wherever it may arise. Because the inquiry is directed at assisting the factfinder to make the appropriate inference regarding the historical question of actual copying, the question becomes whether that inference is aided or harmed by allowing scrutiny of unprotected aspects of plaintiff's work. Most courts take the position that the probative similarity inquiry should extend to both protected and unprotected elements of plaintiff's work.<sup>66</sup>

Because the question is merely probative of defendant's actions, evidence that defendant copied extensively from plaintiff—including of unprotected elements—establishes the bare act of copying. The next step of the inquiry, *i.e.*, substantial similarity, can then isolate the protected elements further to determine the lawfulness of that copying.<sup>66.1</sup> Nonetheless, this finding of copying *tout court* goes only so far—after all, we just saw the Supreme Court's formulation that not all copying amounts to copyright infringement.<sup>66.2</sup> If the later step of the comparison (*viz.*, substantial similarity) is going to be limited to protected elements alone, it is best to broaden the comparison at the earlier stage of probative similarity.

### [2] Holistic.

Most courts have ruled that the probative similarity inquiry ought to extend to both protected and unprotected parts of plaintiff's work. Their understanding is that defendant's copying of non-protectable parts of plaintiff's work can nevertheless "be probative of whether protected elements were copied."<sup>67</sup> The

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<sup>62</sup> See [§ 13D.06\[A\]\[2\]](#) *supra*.

<sup>63</sup> See Part II *infra*.

<sup>64</sup> [Feist v. Rural Telephone Service Co.](#), 499 U.S. 340, 361 (1991). See [§ 13.02\[B\]](#) *supra*.

<sup>65</sup> See [§ 13D.06\[B\]\[1\]](#) *supra*.

<sup>66</sup> See [§ 13D.06\[C\]\[2\]](#) *infra*.

<sup>66.1</sup> See Part II *infra*.

<sup>66.2</sup> See [§ 13D.02\[B\]](#) *supra*.

<sup>67</sup> See [Zalewski v. Cicero Builder Dev., Inc.](#), 754 F.3d 95, 101 (2d Cir. 2014); [Positive Black Talk Inc. v. Cash Money Records, Inc.](#), 394 F.3d 357, 370 n.9 (5th Cir. 2004), abrogated on other grounds, [Reed Elsevier, Inc. v. Muchnick](#), 559 U.S. 154 (2010); [Fisher-Price, Inc. v. Well-Made Toy Mfg. Corp.](#), 25 F.3d 119, 123 (2d Cir. 1994).

Tenth Circuit elaborated on this logic, characterizing the inclusion of non-protected elements as “potentially essential”:

We acknowledge that unprotectable elements of a program, even if copied verbatim, cannot serve as the basis for ultimate liability for copyright infringement. However, the copying of even unprotected elements can have a probative value in determining whether the defendant copied the plaintiff’s work. Where a court first extracts all unprotected elements of a work, and only compares protected elements, it deprives itself of the use of probative, and potentially essential, information on the factual issue of copying. That is because, even if a court finds protectable elements of a program to be similar, it still must determine whether those elements were copied from the plaintiff’s work, whether the duplication can be attributed to other factors, or whether its reproduction was pure chance. The fact that non-protectable elements of the original program were also copied, although it cannot be the basis for liability, can be probative of whether protected elements were copied. That is because, in certain situations, it may be more likely that protected elements were copied if there is evidence of copying among the unprotected elements of the program.<sup>68</sup>

This approach is best described as the *holistic approach* to probative similarity.

One district court deployed this method to find probative similarity.<sup>69</sup> Plaintiff carpet designer alleged that defendant competitors infringed its designs. Having found proof of access, the court proceeded to examine the similarities between the shapes, color schemes and motifs of the parties’ designs—without drawing any distinction between protected and unprotected parts of plaintiff’s designs.<sup>70</sup> It concluded that the “similarities [were] too great to be reasonably expected to have arisen independently in the two works.”<sup>71</sup> In conjunction with its finding of access, it thereupon determined there to be actual copying on the basis of that holistic comparison.<sup>72</sup> By contrast, in the follow-up inquiry into improper appropriation, the court found parts of plaintiff’s works to be unprotected.<sup>73</sup>

### [3] Winnowed.

Beyond the sentence previously quoted, the Supreme Court’s *Feist* decision went on observe that infringement is predicated on “copying of constituent elements of the work that are original.”<sup>74</sup> Some courts, principally in the First Circuit, have applied that language to *both* probative similarity and improper appropriation.<sup>75</sup> In their view, probative similarity must be restricted to protected elements of the plaintiff’s

<sup>68</sup> [Gates Rubber Co. v. Bando Chem. Indus., Ltd., 9 F.3d 823, 832 n.7 \(10th Cir. 1993\)](#).

<sup>69</sup> [Odegard, Inc. v. Costikyan Classic Carpets, Inc., 963 F. Supp. 1328, 1337–39 \(S.D.N.Y. 1997\) \(Treatise quoted\)](#).

<sup>70</sup> [Id. at 1337](#).

<sup>71</sup> [Id. at 1337](#).

<sup>72</sup> [Id. at 1338–39](#).

<sup>73</sup> [Id. at 1338](#). In one unreported case involving an artist who claimed that her song had been infringed by several prominent musicians in the production of their own song, the district court chose to restrict its examination of probative similarity between the two works exclusively to the protected elements of plaintiff’s work. [Boone v. Jackson, No. 03 CIV. 8661 \(GBD\), 2005 U.S. Dist. LEXIS 13172, at \\*10 \(S.D.N.Y. July 1, 2005\)](#). Accordingly, it granted defendants’ motion for summary judgment on the question. *Id.* at \*19. Although the Second Circuit affirmed the lower court’s judgment, it nevertheless concluded that, on the method chosen for probative similarity, the district court erred in “dissecting the works into protectable and non-protectable elements and then comparing the protectable elements for similarities.” [Boone v. Jackson, 206 F. App’x 30, 31 \(2d Cir. 2006\)](#). Nevertheless, the appellate court ultimately determined that there was no probative similarity between the works, given that defendant’s own expert conceded the works to be different. [Id. at 32–33](#).

<sup>74</sup> [Feist, 499 U.S. at 361](#).

work.<sup>76</sup> The rationale for this interpretation appears to be two-fold: First, it is thought to facilitate trial court resolution of the case as a matter of law via summary judgement.<sup>77</sup> Second, it sets up the focus on the inquiry for the fact-finder in the subsequent step (improper appropriation) in a way that does not require any intermediate analysis between those two steps.<sup>78</sup> Because this approach entails separating the wheat from the chaff before examining any similarity, it is aptly described as the *winnowed approach* to probative similarity.

In *Johnson v. Gordon*, the First Circuit endorsed this form of winnowing.<sup>79</sup> Reiterating that probative similarity required it to dissect the work and excise “aspects that are not copyrightable because they represent unprotected ideas or unoriginal expression,” the decision limited its assessment of similarity to aspects of plaintiff’s work that it determined to be copyrightable.<sup>80</sup> Plaintiff challenged this approach, claiming that the court had erroneously engaged in a “hyper-dissection” of the work by eliminating unprotectable elements from the probative similarity examination.<sup>81</sup> The First Circuit disagreed, concluding that focusing on the original elements of a work was a “valid investigative technique” in the infringement analysis.<sup>82</sup>

Let us examine the justification for winnowing that it purportedly enables courts to resolve the question of infringement, as a matter of law, at an early stage of the proceedings. Two cases decided by district courts in the First Circuit illustrate the manner in which this winnowing occurs. In the first, plaintiff authored a memoir *Authoritas* that documented the controversy surrounding the origins of Facebook.<sup>83</sup> Defendants included the author of a book about Facebook entitled *The Accidental Billionaires*, along with a movie studio that converted it into a film. Defendants moved to dismiss the claim, arguing that the probative similarity, if any, between the works related to ideas and factual content that was insufficient as a matter of law to support either actual copying or improper appropriation.<sup>84</sup> Investigating probative similarity, the court began by undertaking a detailed analysis of the elements alleged to be have been copied by defendants and, in that process, eliminated significant portions from its consideration. It found that those elements did “not deserve copyright protection” for reasons of originality or subject matter.<sup>85</sup> Still, even after eliminating unprotected elements, the court concluded that the remaining similarity “may demonstrate a sufficient degree of similarity to allow the Court to find that there is probative similarity” and refused to dismiss the

<sup>75</sup> [Johnson v. Gordon, 409 F.3d 12, 19 \(1st Cir. 2005\)](#).

<sup>76</sup> See [Johnson v. Gordon, 409 F.3d 12, 19–20 \(1st Cir. 2005\)](#); [Concrete Mach. Co. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 608–09 \(1st Cir. 1988\)](#); [Feldman v. Twentieth Century Fox Film Corp., 723 F. Supp. 2d 357, 366 \(D. Mass. 2010\)](#).

<sup>77</sup> “By dissecting the accused work and identifying those features which are protected in the copyrighted work, the court may be able to determine as a matter of law whether or not the former has copied protected aspects of the latter.” [Concrete Mach. Co. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 608 \(1st Cir. 1988\)](#).

<sup>78</sup> [Id. at 609](#).

<sup>79</sup> [409 F.3d 12 \(1st Cir. 2005\)](#).

<sup>80</sup> [Id. at 19](#).

<sup>81</sup> [Id. at 25](#).

<sup>82</sup> [Id. at 25](#).

<sup>83</sup> [Greenspan v. Random House, Inc. 859 F. Supp. 2d 206 \(D. Mass. 2012\)](#), aff’d unpub., [2012 U.S. App. LEXIS 22285 \(1st Cir. 2012\)](#), cert. denied, [133 S. Ct. 1811 \(2013\)](#).

<sup>84</sup> [Id. at 211](#).

<sup>85</sup> [Id. at 216](#). See [Chap. 2](#) *supra*.

claim on that basis alone.<sup>86</sup> At a later stage, it nevertheless found there to be no improper appropriation and granted defendant's motion on that ground.<sup>87</sup>

On the other hand, another judge in the same district entertained a motion to dismiss on the question of probative similarity and actual copying.<sup>88</sup> Plaintiff here produced an animated television series in the late 1990s. A decade later, defendants co-created their own animated series titled "Class of 3000." Defendants moved to dismiss the resulting infringement case, arguing that plaintiff had not established actual copying.<sup>89</sup> The district court agreed. Beginning with the proposition that probative similarity had to be examined by excising unprotected elements, the opinion proceeded to undertake an elaborate scrutiny of each allegedly copied element to assess whether copying could be inferred therefrom. In so doing, it found each alleged similarity to pertain to an unprotected element in plaintiff's work, based on originality, scenes-a-faire, and subject matter.<sup>90</sup> Accordingly, it dismissed the action for plaintiff's failure to state a claim.<sup>91</sup> Noting that it could have dismissed the claim on actual copying alone, the court nevertheless also proceeded to find no improper appropriation, either. Without the excision of unprotected elements, *i.e.*, the winnowed approach, the probative similarity inquiry would have yielded a finding of significant similarity between the two works and thus a plausible finding of actual copying.

#### **[4] Preferred Resolution.**

With those two contrasting views ventilated, which approach represents the better viewpoint for future courts to follow? On balance, several considerations lead to the conclusion that the holistic approach to probative similarity is preferable to the winnowed approach.

First, it bears emphasis that the whole purpose of the current inquiry is an *evidentiary* one, directed at enabling the factfinder to examine the plausibility of actual copying on the basis of similarities between the works.<sup>92</sup> The question that must therefore be asked is whether excising unprotected material from a comparison of the works aids—or instead hinders—the ability to draw the correct inference. In practice, the excision works to hinder that inquiry.

Consider a work comprising both protected and unprotected material, such as the two quilt designs at issue in *Boisson v. Banian, Ltd.*<sup>93</sup> The designs consisted

of square blocks containing the capital letters of the alphabet, displayed in order. The blocks are set in horizontal rows and vertical columns, with the last row filled by blocks containing various pictures or

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<sup>86</sup> [859 F. Supp. 2d at 217](#).

<sup>87</sup> [Id. at 218](#) ("[Plaintiff] has not alleged sufficient facts to establish that a reasonable, ordinary observer could conclude that the defendants unlawfully appropriated the plaintiff's original expressions.").

<sup>88</sup> [McGee v. Benjamin, 102 U.S.P.Q.2d 1299 \(D. Mass. 2012\)](#).

<sup>89</sup> The inquiry arose against the backdrop of conceded access, thus rendering probative similarity the only operative element. [Id. at 1304](#).

<sup>90</sup> [Id. at 1305–07](#).

<sup>91</sup> [Id. at 1307](#). Nonetheless, for good measure, the court turned to substantial similarity, and determined that plaintiff failed that test as well. [Id. at 1307–08](#).

<sup>92</sup> See [§ 13D.06\[B\]\[1\]](#) *supra*.

<sup>93</sup> [273 F.3d 262 \(2d Cir. 2001\)](#).

icons [and t]he letters and blocks are made up of different colors, set off by a white border and colored edging.<sup>94</sup>

Unquestionably, the alphabets and their ordering, as well as the individual colors themselves, were insufficiently creative to attract copyright protection.<sup>95</sup> The originality of the design lay in its combination of these individual elements into a unitary whole.<sup>96</sup>

If the unprotectable parts of the protected design were excised from the comparison—as the winnowed approach demands—nothing would remain to compare, as even “original works broken down into their composite parts would usually be little more than basic unprotectible elements like letters, colors and symbols.”<sup>97</sup> The excision would therefore render the very exercise of probative similarity useless, effectively impeding any inference as to the presence or absence of actual copying. Consequently, the presence of unprotected elements in the probative similarity aids the inferential nature of the inquiry in a way that their categorical excision would hinder.

Second, insofar as one of the reasons for winnowing is the need to streamline the inquiry early on so that the later step inquiring into improper appropriation focuses only on protected material, nothing prevents a court from accomplishing that goal through appropriate sequencing of issues. In other words, to the extent that improper appropriation is lacking, the district court may award summary judgment to defendant without delving into the question of probative similarity.<sup>98</sup>

One additional consideration is pertinent here, which looks into the coordinate inquiry regarding copying. As we broaden our attention beyond the current domain of *factual* copying to delve into the separate matter of proof of *legal* copying,<sup>99</sup> we will see that courts following *Arnstein v. Porter* have formulated complex standards—they allow “dissection” and expert testimony on the actual copying prong but disallow those aspects with respect to improper appropriation.<sup>100</sup> Nonetheless, that *dissection* is distinct from the *winnowing* currently under examination. Specifically, dissection refers to analysis of a work by breaking it down into its constituent parts—but without any requirement that unprotected parts thus identified be eliminated from the analysis.<sup>101</sup> In stark contrast, winnowing mandates eliminating those unprotected parts from the copying calculus. Given that this sort of elimination exceeds anything contemplated by *Arnstein* and its progeny, that case does not support winnowing as part of determining probative similarity.

<sup>94</sup> [Id. at 266.](#)

<sup>95</sup> See [§ 2.01](#) *supra*.

<sup>96</sup> [273 F.3d at 268](#). See [§ 3.04](#) *supra*.

<sup>97</sup> [273 F.3d at 272](#).

<sup>98</sup> See [§ 13D.06\[C\]\[3\]](#) *supra*, discussing *Greenspan v. Random House, Inc.* 859 F. Supp. 2d 206 (D. Mass. 2012). On sequence, see [§ 13D.06\[A\]\[2\]](#) N. 10 *supra*.

<sup>99</sup> See Part II *infra*.

<sup>100</sup> We have already encountered this case at length. See [§ 13D.02\[D\]\[1\]](#) *supra*. The reader’s attention is drawn to the long block quote set forth therein, and in particular to the division of the inquiry into factual *versus* legal copying. As to the first.

analysis (“dissection”) is relevant, and the testimony of experts may be received to aid the trier of the facts. If evidence of access is absent, the similarities must be so striking as to preclude the possibility that plaintiff and defendant independently arrived at the same result.

If copying is established, then only does there arise the second issue, that of illicit copying (unlawful appropriation.). On that issue (as noted more in detail below) the test is the response of the ordinary lay hearer; accordingly, on that issue, “dissection” and expert testimony are irrelevant.

[Arnstein v. Porter](#), 154 F.2d 464, 468 (2d Cir. 1946).

<sup>101</sup> See N. 100 *supra*.

In sum, the holistic approach makes better analytical and functional sense than the winnowed approach. It therefore qualifies as the preferred vehicle to operationalize the inquiry into probative similarity.

Nimmer on Copyright

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