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## 4 Nimmer on Copyright § 13D.32

Nimmer on Copyright  
PART II LEGAL COPYING

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CHAPTER 13D The Prima Facie Case

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### § 13D.32 “Thin” Copyrights and “Supersubstantial” Similarity<sup>†</sup>

The previous section’s discussion of the perils of applying the concept of “total concept and feel” to a broad range of copyrighted works called specific attention to some courts’ application of the term to architectural works, which are said to enjoy only “thin” copyright.<sup>1</sup> The time has come to explicate the distinction between thinner and thicker copyrights—and the different standard that courts have devised to deal with copyrighted works that are only minimally creative.<sup>2</sup>

This discussion focuses on architectural works as a paradigmatic example of works entitled to only “thin” protection.<sup>3</sup> But that standard is not confined to functional buildings, as we shall see below concerning the iconic Barbie doll.<sup>4</sup>

#### **[A] A Hierarchy of Copyright Protection**

The measure of the *substantial* component of “substantial similarity” may vary according to circumstances. Many copyrights represent significant creative effort, whereas others reflect only scant creativity.<sup>5</sup> The former may be conceived as reasonably robust, in contrast to the more limited protection accorded the other. The Supreme Court labels protection of that latter variety “thin.”<sup>6</sup> More similarity is required when less protectable matter is at issue.<sup>7</sup>

With respect to commercial documents, for example, the similarity presumably must be more extensive than in the case of more artistic works in order to justify a finding of substantial similarity.<sup>8</sup> If the quantum of originality is very modest, it may be that “more than ‘substantial similarity’” should be necessary for a finding of

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<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.31\[B\]\[2\] supra](#).

<sup>2</sup> See [§ 13D.32\[A\] infra](#).

<sup>3</sup> See [§ 13D.32\[B\] infra](#).

<sup>4</sup> See [§ 13D.32\[C\] infra](#).

<sup>5</sup> [Well-Made Toy Mfg. Corp. v. Goffa Int’l Corp.](#), 210 F. Supp. 2d 147, 163 (E.D.N.Y. 2002) (*Treatise quoted*), *aff’d*, 354 F.3d 112 (2d Cir. 2003). (Note that the Supreme Court later disapproved the Second Circuit’s reference in that affirmation to copyright registration as “jurisdictional.” See [§ 7.16\[B\]\[2\]\[c\] N. 145 supra](#).)

<sup>6</sup> [Feist Publications, Inc. v. Rural Tel. Serv. Co.](#), 499 U.S. 340, 349, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991). See [§ 13D.15 supra](#).

<sup>7</sup> [Lennar Homes of Tex. Sales & Mktg., Ltd. v. Perry Homes, LLC](#), 117 F. Supp. 3d 913, 935 (S.D. Tex. 2015) (*Treatise quoted*); [Zalewski v. T.P. Builders, Inc.](#), 875 F. Supp. 2d 135, 148 (N.D.N.Y. 2012) (*Treatise quoted*), *aff’d* (but vacated as to fees), 754 F.3d 95 (2d Cir. 2014).

<sup>8</sup> [Universal Athletic Sales Co. v. Salkeld](#), 511 F.2d 904 (3d Cir. 1975) (*Treatise quoted*), *cert. denied*, 423 U.S. 863 (1975).

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infringement.”<sup>9</sup> Thus, if substantial similarity is the normal measure required to demonstrate infringement, then “supersubstantial” similarity<sup>10</sup> must pertain<sup>11</sup> when dealing with works subject to only “thin” protection.<sup>12</sup>

At the limiting case of “the thinnest of copyright protection,” liability hinges on entire duplication.<sup>13</sup> In line with that approach, the Ninth Circuit has held, “When the range of protectable and unauthorized expression is narrow, the appropriate standard for illicit copying is virtual identity.”<sup>14</sup> Other circuits are in accord.<sup>15</sup> Of course, that virtual identity is not the same as absolute identity. As the Second Circuit encapsulates the matter, even a thin copyright is not “anorexic.”<sup>16</sup> Thus, tiny variations fail to detract from supersubstantial similarity,<sup>17</sup> albeit greater distinctions may negate liability.<sup>18</sup>

The foregoing reference to “thin” copyright protection inspired the Eleventh Circuit, sitting *en banc*, to formulate a taxonomy of creativity, and the corresponding protection afforded each type:

There are three types of work that are entitled to copyright protection—creative, derivative, and compiled. Copyrights in these three distinct works are known as creative, derivative, and compilation copyrights. An example of a creative work is a novel. An example of a derivative work is a screenplay based on a novel; it is called “derivative” because it is based on a preexisting work that has been recast, transformed, or adapted. An example of a compilation is Warren’s Factbook. The Act has created a hierarchy in terms of the protection afforded to these different types of copyrights. A creative work is entitled to the most

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<sup>9</sup> [\*Thomas Wilson & Co. v. Irving J. Dorfman Co.\*, 268 F. Supp. 711 \(S.D.N.Y. 1967\)](#) (protection for lace design).

<sup>10</sup> After quoting most of the above paragraph, one case concluded that a fact-based World War II memoir is more akin to a novel than to a phone directory, and hence that supersubstantial similarity is not required. [\*Jacobsen v. Deseret Book Co.\*, 287 F.3d 936, 943–45 & n.6 \(10th Cir.\) \(Treatise quoted\)](#), cert. denied, **537 U.S. 1066 (2002)**.

<sup>11</sup> For determining not to apply the supersubstantial similarity test after quoting the above paragraph, see [\*Kindergartners Count, Inc. v. Demoulin\*, 249 F. Supp. 2d 1214, 1228–1229](#) & nn. 73–76 (D. Kan. 2003) (Treatise quoted).

<sup>12</sup> [\*TransWestern Pub. Co. LP v. Multimedia Marketing Assocs., Inc.\*, 133 F.3d 773, 776 \(10th Cir. 1998\) \(Treatise quoted\)](#); [\*Trek Leasing, Inc. v. United States\*, 66 Fed. Cl. 8, 19 \(2005\) \(Treatise quoted\)](#). See [\*Wilson v. Brennan\*, 666 F. Supp. 2d 1242, 1258 \(D.N.M. 2009\)](#), aff’d unpub., [\*390 Fed. Appx. 780 \(10th Cir. 2010\)\*](#); [\*Pampered Chef, Ltd. v. Magic Kitchen, Inc.\*, 12 F. Supp. 2d 785, 792–793 \(N.D. Ill. 1998\)](#) (thin copyright accorded catalogs).

<sup>13</sup> [\*Trek Leasing, Inc. v. United States\*, 66 Fed. Cl. 8 \(2005\) \(Treatise quoted\)](#). See [\*Francorp, Inc. v. Siebert\*, 210 F. Supp. 2d 961, 966 \(N.D. Ill. 2001\)](#).

<sup>14</sup> [\*Apple Computer, Inc. v. Microsoft Corp.\*, 35 F.3d 1435, 1439, 1442 \(9th Cir. 1994\)](#) (“[W]e conclude that only ‘thin’ protection, against virtually identical copying, is appropriate”), cert. denied, **513 U.S. 1184 (1995)**. See text accompanying [§ 13D.26](#) & N. 59 *supra*.

<sup>15</sup> [\*TransWestern Pub. Co. LP v. Multimedia Marketing Assocs., Inc.\*, 133 F.3d 773, 776 \(10th Cir. 1998\) \(Treatise quoted\)](#). See [\*MiTek Holdings, Inc. v. Arce Eng’g Co.\*, 89 F.3d 1548, 1558 \(11th Cir. 1996\)](#).

<sup>16</sup> [\*Key Publications, Inc. v. Chinatown Today Pub. Enters., Inc.\*, 945 F.2d 509, 514 \(2d Cir. 1991\)](#). Copyright law therefore precludes copying of substantially the same selection or arrangement, rather than precluding only an exact replica of the copyrighted work. *Id.* (“We have not read *Feist* in such a broad and self-defeating fashion.”). See [\*Nester’s Map & Guide Corp. v. Hagstrom Map Co.\*, 796 F. Supp. 729, 732–734 \(E.D.N.Y. 1992\)](#); [\*Budish v. Gordon\*, 784 F. Supp. 1320, 1333–1334 \(N.D. Ohio 1992\)](#).

<sup>17</sup> See [\*Express, LLC v. Fetish Group, Inc.\*, 424 F. Supp. 2d 1211, 1227–1228 \(C.D. Cal. 2006\)](#).

<sup>18</sup> See [\*Amini Innovation Corp. v. McFerran Home Furnishings, Inc.\*, 68 F. Supp. 3d 1170, 1177 \(C.D. Cal. 2014\)](#) (material dispute of facts precluded summary judgment on this issue); [\*Cosmos Jewelry Ltd. v. Po Sun Hon Co.\*, 470 F. Supp. 2d 1072, 1084 \(C.D. Cal. 2006\)](#).

protection, followed by a derivative work, and finally by a compilation. This is why the *Feist* Court emphasized that the copyright protection in a factual compilation is “thin.”<sup>19</sup>

## [B] Architectural Works

An Eleventh Circuit panel later quoted that *en banc* language. *Intervest Construction Inc. v. Canterbury Estate Homes, Inc.* deemed an architectural work to be essentially a compilation of unprotectable elements protected by a thin copyright.<sup>20</sup> As a different court had ruled, given the inherent constraints in designing a house to accommodate residents who wish to live in it, “there are only so many ways those individual elements can be arranged in a cost-effective ... design.”<sup>21</sup>

Though agreeing with *Intervest’s* result, the Second Circuit disagreed with its reasoning. *Zalewski v. Cicero Builder Development, Inc.* reached back to the *en banc* case that inspired the later Eleventh Circuit panel,<sup>22</sup> challenging the trichotomy proposed there:<sup>23</sup> “‘Creative,’ ‘derivative,’ and ‘compiled’ may be useful concepts in some cases, but we reject the idea that works always fall neatly into one of these categories.”<sup>24</sup> Rather than singling out architecture for special copyright treatment, every “work of art will have some standard elements, which taken in isolation are uncopyrightable,” meaning that the “challenge in adjudicating copyright cases is ... to determine what in it originated with the author and what did not.”<sup>25</sup> Instead of the categories just posited, the opinion looked to traditional copyright doctrines,<sup>26</sup> such as merger, scenes a faire, and the public domain.<sup>27</sup>

In the context of computer software, courts have filtered out design choices of functional works that are dictated by efficiency.<sup>28</sup> By the same token, in the instant domain of building design elements dictated by external factors (such as consumer preferences and zoning requirements), these decisions have held those aspects unprotectable.<sup>29</sup> Thus, notwithstanding the hours that plaintiff expended in admittedly imbuing some of his own expression into the subject architectural designs, his resulting copyright was “very thin”—and not so closely mimicked as to lead to liability.<sup>30</sup> Not only do courts within the Second Circuit follow *Zalewski*<sup>31</sup> but the Seventh Circuit also agrees with it.<sup>32</sup>

<sup>19</sup> [Warren Publ. v. Microdos Data Corp., 115 F.3d 1509, 1515 n.16 \(11th Cir.\)](#) (*en banc*), cert. denied, **522 U.S. 963 (1997)**.

<sup>20</sup> [554 F.3d 914, 919 n.3 \(11th Cir. 2008\)](#). See the discussion of this case in [§§ 2A.09\[B\]\[2\]\[g\], 13D.20 & 13D.22\[D\] supra](#).

<sup>21</sup> That quote comes from the defense expert witness in [Jeff Benton Homes v. Alabama Heritage Homes, Inc., 929 F. Supp. 2d 1231, 1254 \(N.D. Ala. 2013\)](#). Adopting that stance, the court ruled that it “would be unduly restrictive—and would cut against the policy favoring the free flow of ideas and information—to grant plaintiff a monopoly on the design of a roughly 3,000 square-foot home plan using a square box design ...” *Id.*

<sup>22</sup> See [§ 13D.32\[A\] supra](#).

<sup>23</sup> [754 F.3d 95, 103 \(2d Cir. 2014\)](#).

<sup>24</sup> [Id. at 103](#). It added that “we see little support in the statute for *Intervest’s* use of categories.” [Id. at 104](#).

<sup>25</sup> [Id. at 104](#).

<sup>26</sup> [Id. at 105](#). As applied to the architectural context, “Efficiency is an important architectural concern. Any design elements attributable to building codes, topography, structures that already exist on the construction site, or engineering necessity should therefore get no protection.” *Id.*

<sup>27</sup> For those categories, see [§§ 13D.26, 13D.29, 13D.30 supra](#).

<sup>28</sup> See [§ 13D.37\[D\]\[2\] infra](#).

<sup>29</sup> [754 F.3d at 106](#). See [§ 13D.37\[D\]\[3\] infra](#).

<sup>30</sup> [754 F.3d at 107](#).

Later, the Eleventh Circuit reformulated *Intervest*. A jury awarded plaintiff \$127,000 in actual damages for defendant's copying of its plans with only the "slight modification" of adding "a 'his and hers' closet."<sup>33</sup> But other pervasive "modest dissimilarities" throughout moved the district court to throw out the jury verdict on the strength of *Intervest*.<sup>34</sup> In affirming, the court noted *Zalewski's* criticism<sup>35</sup> and agreed with "both the reasoning and outcome" of that Second Circuit case.<sup>36</sup> It characterized its earlier *Intervest* case as "best couched as holding that there was no copyright infringement because the floor plans at issue were similar only with respect to their noncopyrightable elements,"<sup>37</sup> and then turned ecumenical, stating that both "*Intervest* and *Zalewski* control this case."<sup>38</sup> Given that the features of plaintiff's design were "not unusual but humdrum,"<sup>39</sup> the verdict could not stand.<sup>40</sup>

Other cases use different nomenclature.<sup>41</sup> One applied the standards of supersubstantiality<sup>42</sup> in the "novel situation" of architectural works in which "nearly every design element of the two houses at issue" were dictated by external constraints.<sup>43</sup> In particular, the homes were located in Colonial Williamsburg, a development subject

<sup>31</sup> See [Fortgang v. Pereiras Architects Ubiquitous LLC](#), 230 F. Supp. 3d 77, 86–87 (E.D.N.Y. 2017).

<sup>32</sup> See [Design Basics, LLC v. Kerstiens Homes & Designs, Inc.](#), 341 F. Supp. 3d 920, 932 (S.D. Ind. 2018) (following *Lexington*), *aff'd*, 1 F.4th 502 (7th Cir. 2021); [Design Basics, LLC v. Lexington Homes, Inc.](#), 858 F.3d 1093, 1101 (7th Cir. 2017). Later, the Seventh Circuit clarified that its standards were congruent with the *First Circuit's in T-Peg, Inc. v. Vermont Timber Works, Inc.*, 459 F.3d 97, 112 (1st Cir. 2006). See also [Design Basics, LLC v. Signature Constr., Inc.](#), 994 F.3d 879, 890 n.6 (7th Cir. 2021).

<sup>33</sup> [Home Design Servs., Inc. v. Turner Heritage Homes, Inc.](#), 101 F. Supp. 3d 1201, 1205–06 (N.D. Fla. 2015).

<sup>34</sup> [Id. at 1215](#). Had the jury verdict been reinstated, the district judge wished to uphold its award of only a small part of the \$2.4 million in defendants' receipts. [Id. at 1205, 1216–19](#). See [§ 14.03\[C\] infra](#). But the affirmance prevented those aspects from reaching fruition.

<sup>35</sup> 825 F.3d 1314, 1322 (11th Cir. 2016), *cert. denied*, 580 U.S. 1212 (2017).

<sup>36</sup> [Id. at 1324](#).

<sup>37</sup> [Id. at 1324](#).

<sup>38</sup> [Id. at 1325](#). A footnote warned against a "more expansive reading" of *Intervest* that "would nearly eliminate copyright protection for architectural works." [Id. at 1324 n.7](#) (noting that *Intervest* is not to be read as "holding that modest differences between floor plans always preclude copyright infringement").

<sup>39</sup> [Id. at 1325](#).

<sup>40</sup> One judge stated, "I think we lost our way in *Intervest*." 825 F.3d at 1330 (Rosenbaum, J., concurring). She took special aim at that case's

notion that judges have a special grasp on "the concept of the idea/expression dichotomy and how it should be applied in the context of the works before them." No degree of mastery of the "concept of the idea/expression dichotomy" renders a judge better able to determine whether an average lay observer would recognize an alleged copy as having been appropriated from a copyrighted work.

[Id. at 1332](#) (citations omitted).

<sup>41</sup> One case promulgates its own terminology of "specific protection." [Sieger Suarez Architectural P'ship v. Arquitectonica Int'l Corp.](#), 998 F. Supp. 2d 1340, 1346 (S.D. Fla. 2014) ("Architectural works, and other compilations, have 'specific copyright protection' in that the copyright protects the exact work itself; only subsequent works which copy the work's specific expressions and designs will infringe upon that protection.").

<sup>42</sup> [Charles W. Ross Builder, Inc. v. Olsen Fine Home Bldg., LLC](#), 827 F. Supp. 2d 607, 620 (E.D. Va. 2011) (*Treatise cited*).

<sup>43</sup> [Id. at 611–612](#). Another case followed this ruling. See [Zalewski v. T.P. Builders, Inc.](#), 875 F. Supp. 2d 135, 153 (N.D.N.Y. 2012), *aff'd (but vacated as to fees)*, 754 F.3d 95 (2d Cir. 2014).

to a 102-page handbook precisely mandating stylistic requirements for the traditional Georgian architecture required throughout.<sup>44</sup> The court therefore denied liability for copyright infringement.<sup>45</sup> The Fourth Circuit vacated that ruling and remanded for determination under the traditional test for substantial similarity, not the variant that demands “supersubstantiality.”<sup>46</sup> On remand, the trial court again ruled in defendant’s favor based on absence of substantial similarity.<sup>47</sup>

Other architecture cases have likewise recognized only “thin” protection to plaintiffs’ works,<sup>48</sup> unimpressed by the congruence of common features.<sup>49</sup> Of course, not all decisions rule in favor of architecture defendants.<sup>50</sup> One allowed plaintiff’s case to proceed based on copying a home exterior, even though the interiors were wholly different.<sup>51</sup> It also allowed the case to proceed based on copying of a brochure depicting the exterior.<sup>52</sup>

### [C] Beyond Architectural Works

Despite the many authorities just canvassed, not all “supersubstantiality” or “virtual identity” cases arise in the architecture context. Courts have found that a glass-enclosed jellyfish sculpture,<sup>53</sup> a personal computer’s graphical user interface,<sup>54</sup> and a logo consisting of a black-and-white drawing of a rectangular milk crate holding a sleeved vinyl record<sup>55</sup> all deserve only thin copyright protection, for in each of these cases, there were only a limited number of ways to portray the object at hand.<sup>56</sup> Value judgments<sup>56.1</sup> can arise here,<sup>56.2</sup> no less than in other aspects of substantial similarity.<sup>56.3</sup>

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<sup>44</sup> [Ross, 827 F. Supp.2d at 612](#). For a recitation of the common elements, see [id. at 621](#). Had the case been brought in 1750, the court allowed that plaintiff might have prevailed. [id. at 622](#).

<sup>45</sup> It also denied a parallel count alleging removal of copyright management information. See [§ 12A.08 supra](#). The fact of similarities between plaintiff’s and defendant’s plans failed to support the inference that the latter consisted of the former “with the copyright information removed.” [827 F. Supp. 2d at 624](#).

<sup>46</sup> [496 Fed. Appx. 314 \(4th Cir. 2012\)](#).

<sup>47</sup> [977 F. Supp. 2d 567 \(E.D. Va. 2013\)](#).

<sup>48</sup> See [Dream Custom Homes, Inc. v. Modern Day Constr., Inc., 773 F. Supp. 2d 1288, 1309 \(M.D. Fla. 2011\)](#), *aff’d unpub.*, [476 Fed. Appx. 190 \(11th Cir. 2012\)](#).

<sup>49</sup> See [Jeff Benton Homes v. Alabama Heritage Homes, Inc., 929 F. Supp. 2d 1231, 1254. \(N.D. Ala. 2013\)](#).

<sup>50</sup> See [Ranieri v. Adirondack Dev. Grp., LLC, 164 F. Supp. 3d 305, 332–34 \(N.D.N.Y. 2016\)](#) (distinguishing *Zalewski*); [Design Basics LLC v. J & V Roberts Invs., Inc., 130 F. Supp. 3d 1266, 1280 \(E.D. Wis. 2015\)](#) (distinguishing *Zalewski* when “the arrangement of every single room in the defendants’ plan is nearly identical to the plaintiffs’ design” and “the placement of countertops, wet bars, and closets appears identical as well”); [Monterey Bay Homes, LLC v. Chambers, 11 F. Supp. 3d 570, 580 \(D.S.C. 2014\)](#) (denying summary judgment despite “thin” protection for plaintiff’s work).

<sup>51</sup> See [Axelrod & Cherveny, Architects, P.C. v. T. & S. Builders Inc., 943 F. Supp. 2d 357, 362 \(E.D.N.Y. 2013\)](#).

<sup>52</sup> [Id. at 364](#).

<sup>53</sup> See [Satava v. Lowry, 323 F.3d 805, 811 \(9th Cir. 2003\)](#).

<sup>54</sup> See [Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435, 1442 \(9th Cir. 1994\)](#).

<sup>55</sup> See [Milkcrate Athletics, Inc. v. Adidas Am., Inc., 619 F. Supp. 3d 1009, 1018 \(C.D. Cal. 2022\)](#).

<sup>56</sup> See [§ 13D.29\[B\]\[3\] supra](#).



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Or consider Mattel's iconic Barbie doll. Far from being flattered by the imitation she perceived in MGA's Bratz dolls ("The Girls with a Passion for Fashion!"), the original all-American girl filed suit for copyright infringement.<sup>57</sup> After Mattel prevailed at trial, the Ninth Circuit reversed.<sup>58</sup> It analyzed Mattel's two theories: protection in the preliminary sculpt ("a mannequin-like plastic doll body without skin coloring, face paint, hair or clothing")<sup>59</sup> and protection in sketches of the dolls to be manufactured. Given that protection inheres in expression rather than ideas,<sup>60</sup> "MGA was free to look at Bryant's<sup>61</sup> sketches and say, 'Good idea! We want to create bratty dolls too.'"<sup>62</sup> The freedom to copy ideas leads directly to the matter under investigation.

If there's a wide range of expression (for example, there are gazillions of ways to make an aliens-attack movie), then copyright protection is "broad" and a work will infringe if it's "substantially similar" to the copyrighted work. If there's only a narrow range of expression (for example, there are only so many ways to paint a red bouncy ball on blank canvas), then copyright protection is "thin" and a work must be "virtually identical" to infringe.<sup>63</sup>

Applying those considerations to the doll sculptures at issue, Chief Judge Kozinski concluded that MGA deserved "only thin protection against virtually identical works."<sup>64</sup> The opinion elaborated:

Producing small plastic dolls that resemble young females is a staple of the fashion doll market. To this basic concept, the Bratz dolls add exaggerated features, such as an oversized head and feet. But many fashion dolls have exaggerated features—take the oversized heads of the Blythe dolls and My Scene Barbies as examples. Moreover, women have often been depicted with exaggerated proportions similar to those of the Bratz dolls—from Betty Boop to characters in Japanese anime and Steve Madden ads. The

<sup>56.1</sup> A choreographer argued that dance works should always be "subject to broad protection because of the wide range of creative choices available," but the Ninth Circuit declined to adopt that categorical approach. [Hanagami v. Epic Games, Inc.](#), 85 F.4th 931, 948 (9th Cir. 2023).

<sup>56.2</sup> One court allowed a case to proceed as to some instances approaching virtual identity, [Advanta-STAR Auto. Research Corp. of Am. v. Search Optics, LLC](#), 672 F. Supp. 3d 1035, 1049–53 (S.D. Cal. 2023), at the same time that it dismissed other examples demonstrating differences, [id.](#) at 1054–56.

<sup>56.3</sup> See [§ 13D.12\[B\]](#) *supra*.

<sup>57</sup> [Mattel, Inc. v. MGA Entm't, Inc.](#), 616 F.3d 904, 907 (9th Cir. 2010). A welter of opinions has resulted from this dispute, some of them outside the copyright ambit. See [§§ 12.01\[A\]\[1\]\[d\]\[ii\]](#) N. 104 *supra*; [15.05\[B\]](#) N. 59.1a *infra*.

<sup>58</sup> This opinion rejected the jury verdict and district court's resulting injunction, premised on an employment agreement. [616 F.3d at 911–913](#). See [§ 5.03\[B\]\[1\]\[b\]\[iii\]](#) *supra*. Although that basis sufficed to vacate the copyright injunction, the possibility remained that Mattel would prevail again after retrial with proper instructions—leading the appellate court to "believe it prudent to address MGA's appeal of the district court's copyright rulings." [616 F.3d at 913](#). See also N. 75 *infra* (rejecting holding below regarding constructive trust over trademark).

<sup>59</sup> [616 F.3d at 908](#).

<sup>60</sup> See [§ 13D.27\[A\]](#) *supra*.

<sup>61</sup> Carter Bryant began in Mattel's employ, and later developed the Bratz line for MGA. His status underlay the work for hire dispute noted above. See N. 58 *supra*.

<sup>62</sup> [616 F.3d at 913](#).

<sup>63</sup> [Id. at 913–914](#) (citation omitted).

<sup>64</sup> [Id. at 915](#).

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concept of depicting a young, fashion-forward female with exaggerated features, including an oversized head and feet, is therefore unoriginal as well as an unprotectable idea.<sup>65</sup>

Of course, MGA had the option instead to protect itself from even colorable liability by producing dolls with large noses and potbellies. But Mattel could not force its competitors into such an unpalatable market niche. For Mattel owned no monopoly on producing female fashion-forward dolls with exaggerated proportions.<sup>66</sup> Once any rival adopted the permissible expedient of manufacturing its own female fashion-forward doll with exaggerated proportions, its product would inevitably resemble Mattel's to a significant extent. Mattel could legitimately complain only when competitors adopted virtually identical forms.<sup>67</sup> Because Bratz dolls failed to meet that elevated standard of virtual identity, the district court erred in applying the normal standard of "substantial similarity" to the doll sculptures at issue.<sup>68</sup>

Turning to the sketches, different considerations pertained. The Ninth Circuit determined that "there's a wide range of expression for complete young, hip female fashion dolls with exaggerated features."<sup>69</sup> Accordingly, the trial court properly afforded those sketches broad copyright protection against substantially similar works. Nonetheless, the fact that two works are similar in the layman's sense of the term<sup>70</sup> is plainly not enough.<sup>71</sup> The court below erred in applying substantial similarity by failing to filter out<sup>72</sup> the sketch's unprotected elements,<sup>73</sup> effectively allowing Mattel to "claim a monopoly over fashion dolls with a bratty look or attitude, or dolls sporting trendy clothing."<sup>74</sup>

The opinion concluded, "America thrives on competition; Barbie, the all-American girl, will too."<sup>75</sup> Whatever the merits of that prediction for the economic future of Mattel's signature item,<sup>76</sup> the legal standard underlying that sentiment shows when it is appropriate to require supersubstantial similarity based on thinness of copyrightable expression.<sup>77</sup>

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<sup>65</sup> [Id. at 915.](#)

<sup>66</sup> [Id. at 915.](#)

<sup>67</sup> [Id. at 915.](#)

<sup>68</sup> *Id.* The further question remains if a jury properly instructed could return a verdict in Mattel's favor. The opinion fails to address that aspect, given its somewhat *dictum*-like status. See N. 58 *supra*.

<sup>69</sup> [616 F.3d at 916.](#)

<sup>70</sup> [Id. at 916.](#)

<sup>71</sup> [Belair v. MGA Entm't, Inc., 503 Fed. Appx. 65, 67 \(2d Cir. 2012\) \(Treatise quoted\).](#)

<sup>72</sup> See [§ 13D.37](#) *infra*.

<sup>73</sup> "MGA's Bratz dolls can't be considered substantially similar to Bryant's preliminary sketches simply because the dolls and sketches depict young, stylish girls with big heads and an attitude. Yet this appears to be how the district court reasoned." [616 F.3d at 917.](#)

<sup>74</sup> [Id. at 916.](#)

<sup>75</sup> [Id. at 918.](#) The Ninth Circuit evinced fundamental disagreement with the economic approach followed below. Even before analyzing the work for hire issues, see N. 58 *supra*, the opinion reversed the district court's imposition of a constructive trust over all trademarks, based on MGA's appropriation of the names "Bratz" and "Jade." [616 F.3d at 911.](#)

<sup>76</sup> As matters unfolded, that prophecy was fully vindicated when, a dozen years later, the *Barbie* film shattered box office records.

<sup>77</sup> For the sequel to the *Bratz* case on remand, see [§ 20.04\[A\]\[1\]](#) *infra*.



4 Nimmer on Copyright § 13D.32

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