

THE BEGINNING OF THE END: PRELIMINARY
RESULTS OF AN EMPIRICAL STUDY OF
COPYRIGHT SUBSTANTIAL SIMILARITY OPINIONS
IN THE U.S. CIRCUIT COURTS

*Katherine Lippman**

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INTRODUCTION

The Beginning: To present the first empirical study of substantial similarity litigation in the U.S. circuit courts; and, to set forth preliminary results that both contribute to a better understanding of substantial similarity case law and open the door for subsequent scholarship to build upon this study.¹ *The End:* To provide quantitative support for the common sentiment that the current standard for determining copyright infringement must change. This study takes the necessary first step; it is the beginning of the end.

1. All the data included in this study is on file with the author.

Each year, over 2,000 copyright infringement cases are filed in the U.S. district courts.² Yet, the concept of substantial similarity—a “*sine qua non* of every [copyright infringement] determination”—remains one of the most elusive in copyright law.³ Superficially, the concept is simple: “is the defendant’s work substantially similar to the plaintiff’s [work]?”⁴ However, confusion arises from an absence of uniform judicial language, difficulty results from the lack of a single substantial similarity test employed throughout the circuits, and complexity surfaces when subject matter poles apart—from screenplays to computer programs—are adjudicated by the same standard.⁵

Since 1930, when Judge Learned Hand famously pronounced in *Nichols v. Universal Pictures Co.*⁶ that the test for infringement of a copyright is necessarily vague, courts have recognized that not all works can be compared in exactly the same way.⁷ Even so, the desire to fix the boundaries of substantial similarity juxtaposed against an understanding that such an attempt would be a failure has persisted over eighty years later. To a great extent, this tension is the inevitable product of a doctrine that must vary

2. U.S. COURTS, U.S. DISTRICT COURTS—COPYRIGHT, PATENT, AND TRADEMARK CASES FILED (2010), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2010/Table407.pdf>.

3. ROBERT C. OSTERBERG & ERIC C. OSTERBERG, SUBSTANTIAL SIMILARITY IN COPYRIGHT LAW, at xxi (2012); see also CRAIG JOYCE ET AL., COPYRIGHT LAW 692 (6th ed. 2003) (“The inquiry into improper appropriation, both at trial and on appeal, remains one of the most contentious (and, not coincidentally, least precisely delineated) exercises in all of copyright law.”).

4. Jarrod M. Mohler, *Toward a Better Understanding of Substantial Similarity in Copyright Infringement Cases*, 68 U. CIN. L. REV. 971, 994 (2000) (endorsing the abstractions framework devised by Judge Learned Hand in *Nichols v. Universal Pictures Co.*, embodied in the phrase, “is the defendant’s work substantially similar to the plaintiff’s?” and criticizing subsequent attempts to improve upon that framework).

5. *Id.*; see also Ellen M. Bierman, *It Walks Like a Duck, Talks Like a Duck, . . . But Is It a Duck? Making Sense of Substantial Similarity Law as It Applies to User Interfaces*, 16 U. PUGET SOUND L. REV. 319, 321 (1992) (commenting on the confusion that has been created by case law in terms of how to apply the substantial similarity test to different kinds of subject matter and stating that the “[a]pplication of these doctrines and principles has not always been consistent as copyright law has evolved to embrace new technologies”).

6. 45 F.2d 119, 121 (2d Cir. 1930). *Nichols* is a seminal case in the development of the copyright infringement analysis. See *id.* In holding that the defendant’s play, *The Cohens and The Kellys*, did not infringe upon the copyright of the plaintiff’s play, *Abie’s Irish Rose*, Judge Learned Hand lays the groundwork for the abstractions test, which involves distinguishing unprotectable ideas from protectable expression. See *id.* at 120, 122.

7. See, e.g., Christina Bohannon, *Taming the Derivative Works Right: A Modest Proposal for Reducing Overbreadth and Vagueness in Copyright*, 12 VAND. J. ENT. & TECH. L. 669, 683 (2010) (noting that “the test for infringement of copyright is vague and determinations must be made ‘ad hoc’”).

according to the circumstances.⁸ Yet, it is equally true that there lacks a systematic and thorough account of substantial similarity case law that would guide how the boundaries of copyright infringement ought to be fixed, if at all.⁹ As with “fair use,” the affirmative defense to copyright infringement, substantial similarity decisions rely on a set of conventionally agreed-upon cases.¹⁰ If substantiated improvements are to be made to the current framework, a comprehensive study of substantial similarity opinions is imperative. Therefore, the results of an empirical study of substantial similarity case law in the U.S. circuit courts, set forth below, is the necessary first step towards a greater understanding of the substantial similarity doctrine.

Part I reviews the fundamental purposes of copyright law and reveals its increasingly vital impact on the modern U.S. economy. It then provides an illustration of the problems created by the current state of the substantial similarity doctrine. Part II discusses the generalized fashion in which judges analyze copyright infringement. It further explains the various substantial similarity tests employed throughout the circuits to facilitate an understanding of the differences that exist between them. Part III sets forth the empirical results of the 234 opinions studied, including an analysis of their distribution along the dimensions of time, venue, substantial similarity test applied, subject matter of the copyrightable works at issue, and procedural posture. Along each of the dimensions, Part III also reports the substantial similarity win rates¹¹ in the case law. Finally, Part III reports the reversal and affirmance rates of the opinions studied. Significantly, interwoven throughout Part III is a thoughtful examination of the findings that seeks to identify the driving forces and their implications on the future of the substantial similarity case law.

8. See, e.g., Thomas M. Cunningham, *Extending Shaw v. Lindheim: Substantial Similarity and the Idea-Expression Distinction in Copyright of Non-Literary Subject Matter*, 55 U. PITT. L. REV. 239, 262-63 (1993) (advocating a material-specific approach to determining substantial similarity); Michael W. Carroll, *One Size Does Not Fit All: A Framework for Tailoring Intellectual Property Rights*, 70 OHIO ST. L.J. 1361, 1361-62 (2009) (proposing a framework for tailoring intellectual property rights that helps answer pending policy questions, such as “whether . . . statutory licenses should be granted for certain types of copyrighted works . . . and whether fashion design should receive *sui generis* protection”).

9. See, e.g., *Nichols*, 45 F.2d at 121 (“Nobody has ever been able to fix that boundary, and nobody ever can.”).

10. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549, 552-53 (2008) (analogizing the “great men” approach to history with the “leading cases” approach to fair use, whereby wisdom about fair use case law draws from a limited set of “hand-picked” opinions).

11. “Win rates” refers to the proportion of opinions that found copyright infringement on the basis of substantial similarity and thus held in favor of the copyright holder.

I. THE PURPOSE AND THE PROBLEM

Copyright litigation has increased dramatically in the past twenty years, from the number of lawsuits filed to the cost of prosecuting, defending, and resolving a claim.¹² With the average cost of a copyright case ranging between \$384,000 and \$2 million¹³ and the normalcy of multimillion-dollar verdicts,¹⁴ it is not surprising that the outcome of litigation has profound repercussions. For the litigants involved, often the survival of the business and the livelihood of the individual are at stake.¹⁵ Thus, while it is commonplace to assert that the law should change, the bigger picture—the purpose of copyright law and its impact on the economy—must not be taken for granted.¹⁶

A. The Fundamental Purpose and Modern Importance of Copyright Law

Though the seeds of copyright law were planted long before the passage of the first federal Copyright Act in 1790,¹⁷ its roots are most famously recognized in Article I, Section 8, Clause 8 of the Constitution,¹⁸ which states the purpose of copyrights: “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁹ The delicate balancing of public interests with individual rights embodied within the Copyright Clause means that within the free market system, the creator should be able to earn a living, but not to such an extent that it stifles progress or inhibits creativity.²⁰

12. TOD I. ZUCKERMAN, ROBERT D. CHESLER & CHRISTOPHER KEEGAN, *ASSETS & FINANCE: INSURANCE COVERAGE FOR INTELLECTUAL PROPERTY & CYBER CLAIMS* § 1:6 (2011).

13. *American Intellectual Property Law Association Report of the Economic Survey*, INTELLECTUAL PROPERTY INSURANCE SERVICES CORPORATION, <http://www.patentinsurance.com/iprisk/aipla-survey/> (last visited Apr. 15, 2013).

14. ZUCKERMAN, CHESLER & KEEGAN, *supra* note 12, § 1:6.

15. *Id.*

16. *See supra* notes 12-14 and accompanying text.

17. *See* UNITED STATES COPYRIGHT OFFICE, A BRIEF INTRODUCTION AND HISTORY, <http://www.copyright.gov/circs/circ1a.html>; *cf.* Matt Jackson, *One Step Forward, Two Steps Back: An Historical Analysis of Copyright Liability*, 20 *CARDOZO ARTS & ENT. L.J.* 367, 370 (2002) (examining the “legislative histories of the 1909 and 1976 copyright acts”).

18. L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders’ View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 *EMORY L.J.* 909, 910 (2003).

19. U.S. CONST. art. I, § 8, cl. 8.

20. Patterson & Joyce, *supra* note 18, at 951-52 (“The entrepreneur must be able to earn a profit in order to produce the materials of learning, but not to the extent that the profit unduly inhibits the citizen’s use of the product.”); *see also* Warner Bros. v. Am. Broad. Co., 720 F.2d 231, 245 (2d Cir. 1983) (stating that substantial similarity is used to “strike a

This balancing act has become increasingly relevant as intellectual property now pervades most U.S. industries.²¹ Creative ideas have an enormous value in the modern American economy: industry analysts estimate that, as of 2011, intellectual capital²² is worth between \$8.1 trillion and \$9.2 trillion, the equivalent of 55% to 62.5% of the U.S. gross domestic product in 2010.²³ “Core” copyright-related industries²⁴ and design-oriented industries²⁵ alone were worth \$1.52 trillion in 2007.²⁶ In fact, from 2004 to 2007, copyright industries consistently achieved growth rates of “more than twice the real growth rates achieved by the U.S. economy as a whole.”²⁷ The contribution of copyright industries to the growth of the United States is undeniably substantial.²⁸ Thus, the protection and enforcement of intellectual property rights are critical to the advancement of new ideas; without it, innovators would have little incentive to develop intellectual property.²⁹ In-

delicate balance between the protection to which authors are entitled under an act of Congress and the freedom that exists for all others to create their works outside the area protected against infringement”).

21. KEVIN A. HASSETT & ROBERT J. SHAPIRO, WHAT IDEAS ARE WORTH: THE VALUE OF INTELLECTUAL CAPITAL AND INTANGIBLE ASSETS IN THE AMERICAN ECONOMY IV-V (2011), *available at* http://www.sonecon.com/docs/studies/Value_of_Intellectual_Capital_in_American_Economy.pdf.

22. Intellectual capital is strictly defined as “patents, copyrights, and the research and development that produces them.” *Id.* at 1.

23. *Id.* at 2. Based on the notion that the United States has become an idea-based economy that can be measured in very concrete terms, Hassett and Shapiro conducted a study to estimate the monetary value of intellectual capital. *Id.* at IV. Much of the data comes from the Federal Reserve, “which show that since the mid-1990s, a majority of U.S. business investments have gone into intangible assets rather than traditional physical assets.” *Id.*

24. *Id.* at 12 (“[C]ore” copyright industries—music, publishing, broadcasting, motion pictures, and software—generated 6.4 percent of U.S. GDP in 2007 (\$889.1 billion dollars).”).

25. *Id.* “[D]esign-oriented industries . . . [include] jewelry and video games, [as well as] support industries, such as telecom services, and the manufacturers and retailers of CDs, DVD players, and computers.” *Id.*

26. *Id.*; see also STEPHEN E. SIWEK, COPYRIGHT IN THE U.S. ECONOMY: THE 2003-2007 REPORT 3 (2009), *available at* <http://www.iipa.com/pdf/IIPASiwekReport2003-07.pdf> (reporting data that “quantify the size and critical importance of the copyright industries to the U.S. economy”).

27. SIWEK, *supra* note 26, at 17. The copyright industries have disproportionately contributed to real U.S. growth in a very positive way. *Id.* “In 2006-2007, the core copyright industries contributed 22.74% of the real growth achieved for the U.S. economy as a whole . . . [while] the total copyright industries contributed an astounding 43.06% of total real U.S. growth.” *Id.*

28. See *id.*

29. HASSETT & SHAPIRO, *supra* note 21, at V; see also Lisa M. Gable, *The Feasibility of the Abstraction-Filtration-Comparison Test for Computer Software Copyrightability (and Analysis of Bateman v. Mnemonics)*, 14 GA. ST. U. L. REV. 447, 487 (1998) (“If competitors may copy programs with impunity, incentives to create and market innovative pro-

deed, “\$200 billion in counterfeit or pirated goods were traded across borders in 2005,” “\$12.5 billion in pirated music was sold in 2007,” “\$51 billion in pirated software was sold in 2009,” and between “\$70 billion [and] \$88 billion in counterfeit pharmaceuticals [were] sold in 2011.”³⁰ No longer is the strict protection of intellectual property rights simply to benefit the creator; it is essential to the productivity, growth, and income in the idea-based economy of the United States, especially in the idea-intensive industries.³¹

In light of the current state of copyright law—characterized by confusion, inconsistency, and the “indeterminacy and misapplication of tests for copyright infringement”—these figures are alarming.³² Problematically, substantial similarity decisions rely on a relatively small set of conventionally agreed-upon cases that often fail to account for the intricacies of the fact-specific issues inherent in the highly subjective substantial similarity analysis.³³ Sole dependence on an anecdotal method of using “hand-picked” opinions appearing in the U.S. Reports or student casebooks to analyze infringement disputes is a flawed endeavor.³⁴ It unclear whether these opinions are representative of the substantial similarity doctrine as it is practiced in courts today; but, more importantly, such a method risks having far-flung and adverse effects on intellectual property rights and on the U.S. economy. A comprehensive empirical study of substantial similarity opinions is necessary to mediate such risks and to determine the true merits and consequences of the current approaches; it provides the concrete support that is necessary to advocate or oppose a change in a law that has taken decades to evolve into what it is today.

B. An Illustration of the Problem

At the heart of this study is the desire to determine whether or not “our [bizarre system] for proving copyright infringement”³⁵ is deserving of as much criticism as it receives. Surely, with recent cases like *Davis v. American Broadcasting Cos.*,³⁶ it is easy to see why such scholarly disparagement

grams will decrease, thereby frustrating the goal of copyright law, which is to promote creative authorship for the public benefit.”)

30. HASSETT & SHAPIRO, *supra* note 21, at VI.

31. *Id.*

32. Mohler, *supra* note 4, at 972.

33. Beebe, *supra* note 10, at 554 (arguing that “much of our conventional wisdom about our fair use case law, deduced as it has been from the leading cases, is wrong”).

34. *Id.* at 553.

35. Mark A. Lemley, *Our Bizarre System for Proving Copyright Infringement*, 57 J. COPYRIGHT SOC’Y U.S.A. 719, 719-20, 741 (2010) (arguing that the majority approaches to substantial similarity defined by Ninth and Second Circuits make no sense in application).

36. No. 1:10-CV-167, 2010 WL 2998476, at *1 (W.D. Mich. July 28, 2010).

exists. In that case, the Western District of Michigan dismissed the plaintiff's allegations that the defendant's television series, *Eli Stone*, about a lawyer who has auditory hallucinations that are accompanied by popular rock songs, was substantially similar to the plaintiff's novels about a spy hero named *Ely Stone*, an American Indian who also has auditory hallucinations accompanied by popular rock songs.³⁷ Curiously, both protagonists are "reluctant heroes," who use their visions to help people through the guidance and interpretation of their spiritual advisors.³⁸

Still, further "coincidences" abound.³⁹ To list a few: both works involve love triangles with a woman named "Maggie"; predicaments in which each protagonist helps a sick child; visions of being in an historical war; side characters named "Stanley" who flee to Hawaii for personal financial gain; pilots named "Ramirez"; similarly named characters—"Patti" and "Nettie"—with secretarial-type roles; and antagonists with the same initials, albeit reversed, "Matt Dowd" and "Deputy Morse."⁴⁰ Despite such obvious similarities, the judge in the case noted,⁴¹ "[r]easonable minds could not differ on this issue," as apparently, the works share "no overlap" of original elements, and the similarities between them are "either unprotectible [sic] or not substantial."⁴² The defendant thus prevailed on summary judgment.⁴³

However, reasonable minds can, and often do, differ. A leading entertainment litigator believes that "[c]opyright infringement claims against motion picture studios and television networks, for all intents and purposes, are dead."⁴⁴ In the last twenty years, all forty-eight copyright infringement lawsuits against motion picture studios and television networks within the Second and Ninth Circuits and their district courts resulted in defendant

37. *Id.* at *1-3.

38. *Id.* at *8.

39. "Judge Jonker agreed that the works do have some coincidental elements: side characters named Stanley who both have a connection to Hawaii, a love interest named Maggie, spiritual advisers and a love triangle." *Michigan Federal Judge Finds No Similarities Between TV Show, Mystery Books*, WESTLAW J. ENT. INDUS., Sept. 8, 2010, at 5, 5.

40. *Davis*, 2010 WL 2998476, at *8-10; Pl.'s Resp. to Def.'s Mot. to Dismiss at 6-7, 9, *Davis*, (No. 1:10-CV-167) 2010 WL 3266364.

41. On judges' roles in fact-finding on substantial similarity claims, see Timothy L. Warnock, *Where'd You Get That Idea?: Stay Current with These Updates to Copyright Law*, 46 TENN. B.J. 12, 13 (June 2010) ("Although substantial similarity is typically a fact-intensive inquiry, courts were increasingly willing to determine that no rational fact finder could determine the result any differently than the court, and courts consequently resolved substantial-similarity challenges on motions to dismiss and summary judgment.").

42. *Davis*, 2010 WL 2998476, at *10 ("The books and the show are completely different in almost every imaginable way, including the sequences of events, mood, dialogue, characters, plot, pace, setting, and themes. . . . Accordingly, the Court grants Defendants' motion to dismiss.").

43. *Id.*

44. Steven T. Lowe, *Death of Copyright*, 33 L.A. LAW. 32, 32 (2010).

victories.⁴⁵ Only two of the forty-eight cases proceeded to jury trial, while the remaining cases were decided on motions for summary judgment.⁴⁶ *Davis*, then, is simply a corpse in the death of copyright law, at least in terms of literary works, as “[c]ase law has provided defendants with an impenetrable shield of confusing and often contradictory principles that thwart plaintiffs in nearly every instance, with only tiny cracks in that shield providing a mere glimpse of hope.”⁴⁷ But, studios and television networks are not the only defendants who can exploit the clouded tests for substantial similarity and the “morass of confusing case law.”⁴⁸ *The Copyright Defendant’s Guide to Disproving Substantial Similarity on Summary Judgment*,⁴⁹ authored by two intellectual property litigators, offers a “replicable, flexible, and legally defensible” step-by-step method that “if recent decisions are any indication, should bolster a defendant’s chances of success at the summary judgment stage on the issue of substantial similarity” for *all* copyrightable works.⁵⁰

Insight from those in the trenches paints a compelling picture of the defendant-favored state of substantial similarity case law,⁵¹ but practicing attorneys are not its only critics.⁵² Stating that the “overwhelming percentage” of lawsuits against Hollywood movies fail,⁵³ one scholar argues for a lowering of the current substantial similarity standard as it is applied to screenplays.⁵⁴ Arguably, this would level the playing field between studios and “vulnerable” screenwriters facing the “difficult challenge” of proving that his or her script has been stolen.⁵⁵ It seems that the task of proving copyright infringement of a creative work “may be even more difficult than

45. *Id.*

46. *Id.*

47. *Id.* at 40.

48. Joshua M. Dalton & Sara Cable, *The Copyright Defendant’s Guide to Disproving Substantial Similarity on Summary Judgment*, 3 LANDSLIDE 26, 31 (2011) (“Given their increasingly busy dockets, it seems safe to assume that a federal court would be especially amenable to an approach that efficiently guides it . . . towards a legally supported and logical method by which it can discern and dismiss legally insufficient copyright infringement claims.”).

49. *Id.* at 29-31 (charting an approach that a copyright defendant in any circuit can take to increase the chance of defeating substantial similarity on summary judgment).

50. *Id.* at 31. The article also lists common constituent elements of literary works, musical works, architectural works, computer programs, and photographic works that the defendant should argue are commonplace in each of the genres. *Id.* at 28.

51. See *supra* notes 44-49 and accompanying text.

52. See *infra* text accompanying notes 53-55.

53. Nick Gladden, *When California Dreamin’ Becomes a Hollywood Nightmare: Copyright Infringement and the Motion Picture Screenplay: Toward an Improved Framework*, 10 J. INTELL. PROP. L. 359, 360 (2003).

54. *Id.* at 360-61.

55. *Id.*

creating the work in the first place.”⁵⁶ With vague substantial similarity tests, their incorrect application, and inconsistent results to blame, it is rational to proffer that there should not be a test at all.⁵⁷

In light of such fervent criticism and concern that case law is sharply skewed in favor of the defendants, it is rational to wonder whether or not the concept of substantial similarity even possesses the substance “to make the value judgment whether [a] defendant’s copying warrants liability.”⁵⁸

II. THE COPYRIGHT INFRINGEMENT DETERMINATION: ESTABLISHING THE ELEMENTS AND APPLYING A SUBSTANTIAL SIMILARITY TEST

Although this study focuses on the substantial similarity tests, it is important to note that the substantial similarity evaluation is but one element of copyright infringement.⁵⁹ While it is a critical element, not all actions for copyright infringement ever reach this step of the analysis.⁶⁰ Certainly, the difficulty of comparing the various substantial similarity tests is compounded by the fact that the circuits vary in their step-by-step approaches to the elements of copyright infringement.⁶¹ In other words, not only are the sub-

56. See, e.g., Nicole K. Roodhuyzen, *Do We Even Need a Test? A Reevaluation of Assessing Substantial Similarity in a Copyright Infringement Case*, 15 J.L. & POL’Y 1375, 1375, 1418-19 (2007) (arguing that the current tests do not adequately consider the degree of creativity inherent in various industries).

57. *Id.* at 1377 (“As the tests become increasingly elusive for both courts and litigants, it is important to consider whether there should be one single test articulated by the Supreme Court, or rather, whether there should be a test at all.”); see also Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719, 719 (1987) (criticizing “the traditional approach as failing adequately to distinguish copying from misappropriation, failing adequately to distinguish ideas from expression, failing to provide adequate guidelines for determining misappropriation”).

58. Laura G. Lape, *The Metaphysics of the Law: Bringing Substantial Similarity Down to Earth*, 98 DICK. L. REV. 181, 185 (1994). “[S]ubstantial similarity and resulting infringement are found without reference to any standard to give substantial similarity meaning and without regard to the impact of the defendant’s activities on the plaintiff.” *Id.* at 182.

59. Gladden, *supra* note 53, at 460.

60. OSTERBERG & OSTERBERG, *supra* note 3, § 3:1.1.

61. Douglas Y’Barbo, *The Origin of the Contemporary Standard for Copyright Infringement*, 6 J. INTELL. PROP. L. 285, 285-86 (1999) (demonstrating that the Second-Ninth Circuit distinction is substantial, but ignored by the other circuits, which apply the two tests interchangeably); see also OSTERBERG & OSTERBERG, *supra* note 3, § 3:2.1[A] (“It is the different interpretations of *Arnstein* that are the root of the differences between the Ninth Circuit test and the Second Circuit test.”). While the Second Circuit requires the plaintiff to prove both copying and illicit copying (unlawful appropriation) to establish infringement, the Ninth Circuit takes the position that *Arnstein* was actually alluding to the idea/expression dichotomy, and thus, “[t]o constitute an infringement the copying must reach the point of unlawful appropriation or the copying of protected expression itself.” *Id.* § 3:1 n.1 (quoting *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1165 (9th Cir. 1977)).

stantial similarity tests muddled, the paths leading to them are also divergent.⁶² Thus, to supplement the following analysis, it is helpful to understand the basic analysis used in copyright infringement cases.⁶³

A. An Overview of the Prima Facie Case of Copyright Infringement

In any action for copyright infringement, the plaintiff must clear two hurdles, the first of which is simple: he or she must show ownership of a valid, registered copyright to the allegedly infringed work.⁶⁴ To clear the second hurdle, the plaintiff must prove that the defendant copied original elements from the copyrighted work.⁶⁵ The second hurdle involves two main parts: (1) proving, through direct or indirect evidence, that the defendant's allegedly infringing work was copied from the plaintiff's protected work, rather than created independently; and (2) establishing that the defendant copied protected "expression," as opposed to unprotectable "ideas."⁶⁶ The final proof, known as the idea/expression dichotomy, is the axiom at the heart of copyright law: "only the expression of ideas, and not the ideas themselves, are copyrightable."⁶⁷

Copying can be proven through direct or indirect evidence, but because eyewitness testimony or an admission by the defendant is unlikely, this element is often met through indirect proof from which the fact finder could properly infer that copying had occurred.⁶⁸ Such circumstantial evidence requires both access and "probative similarity," or—in the absence of access—"striking similarity."⁶⁹ To show that the infringing work is "probatively similar" to the plaintiff's work, there must be sufficient similarity between the two works to support an inference of copying,⁷⁰ and it merely requires that the defendant copied "*something* from the copyrighted work."⁷¹ Alternatively, even without proof of access, copying can be established by showing "striking similarity"—that "the similarities [between the

62. See Y'Barbo, *supra* note 61, at 285-86.

63. See *id.*

64. OSTERBERG & OSTERBERG, *supra* note 3, § 1:1; see also 2 HOWARD B. ABRAMS, THE LAW OF COPYRIGHT § 14:6 (2011) (providing an outline of the proofs needed to establish a prima facie case of infringement primarily based on the traditional approach of the Second Circuit).

65. See 2 ABRAMS, *supra* note 64, § 14:6.

66. *Id.*

67. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.02 (2012).

68. ALAN LATMAN, THE COPYRIGHT LAW: HOWELL'S COPYRIGHT LAW REVISED AND THE 1976 ACT 161 (5th ed. 1979).

69. *Id.*; see also Alan Latman, "Probative Similarity" as Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement, 90 COLUM. L. REV. 1187, 1189 (1990).

70. See David Nimmer, *Access Denied*, 2007 UTAH L. REV. 769, 784.

71. Ringgold v. Black Entm't Television, Inc., 126 F.3d 70, 75 (2d Cir. 1997) (emphasis added).

two works] must be so striking as to preclude the possibility that plaintiff and defendant” created the work independently.⁷² In such a case, the court considers “the uniqueness of the similarities,”⁷³ including similarities that are quirky or appear in unique or complex contexts, and common mistakes or idiosyncrasies that can only be explained by copying.⁷⁴

Once copying has been proven through direct or indirect evidence,⁷⁵ the final part of the second hurdle requires the plaintiff to establish that the defendant copied enough protected expression from the plaintiff’s work to render both the original and the alleged copy substantially similar.⁷⁶ Substantial similarity, a seemingly simplistic term of art, masks its own complexity.⁷⁷ To support a finding of infringement on the basis of substantial similarity, the copying must be quantitatively and qualitatively sufficient.⁷⁸ A perception that two works are merely “similar” is not sufficient,⁷⁹ but verbatim or literal copying of an entire work is also not required.⁸⁰ Yet, in some cases, copying of a relatively small portion of a work can be actionable if that portion is material and substantial.⁸¹ There are no mechanical

72. *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946); *see also* *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997); *Towler v. Sayles*, 76 F.3d 579, 584-85 (4th Cir. 1996); Daniel E. Wanat, *Copyright Law: Infringement of Musical Works and the Appropriateness of Summary Judgment Under the Federal Rules of Civil Procedure, Rule 56(c)*, 39 U. MEM. L. REV. 1037, 1046 (2009).

73. OSTERBERG & OSTERBERG, *supra* note 3, § 1:3 (“For example, for two pieces of popular music to be ‘strikingly similar’ the similarities must extend ‘beyond themes that could have been derived from a common source or themes that are so trite as to be likely to reappear in many compositions.’” (quoting *Gaste v. Kaiserman*, 863 F.2d 1061, 1068-69 (2d Cir. 1988))).

74. *See* *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1170-71 (7th Cir. 1997); *Lipton v. Nature Co.*, 71 F.3d 464, 471-72 (2d Cir. 1995).

75. OSTERBERG & OSTERBERG, *supra* note 3, § 1:3 (“A plaintiff who demonstrates that a defendant’s work is ‘strikingly similar’ to his copyrighted work still must show that the copied portions comprise a significant enough portion of the copyrighted material in plaintiff’s work so that the defendant’s work is ‘substantially similar’ to the copyrighted work.” (citing *Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1984))).

76. *Id.* at § 1:1.

77. *Id.*

78. *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 75 (2d Cir. 1997); *see also* 2 ABRAMS, *supra* note 64, § 14:6. Different terms have been used to refer to infringement or actionable copying. 2 ABRAMS, *supra* note 64, § 14:6 n.13. “For example, in . . . [*Arnstein*], Judge Frank used the terms ‘copying which is not illicit,’ ‘unlawfully appropriated,’ and ‘wrongfully appropriated’ all in a single paragraph to describe the copying of the portions of a work protected by copyright.” *Id.* (quoting *Arnstein*, 154 F.2d 464, 468, 473 (2d Cir. 1946)).

79. *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 912 (2d Cir. 1980).

80. *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 360 (9th Cir. 1947) (citing KARL OAKES, COPYRIGHTS AND INTELLECTUAL PROPERTY, 18 C.J.S. COPYRIGHTS § 66).

81. *Miller Brewing Co. v. Carling O’Keefe Breweries of Can., Ltd.*, 452 F. Supp. 429, 439 (W.D.N.Y. 1978).

guidelines, no hard and fast rules, and no percentages that can be applied to determine what constitutes a substantial, and thus infringing, similarity, and it is impossible to decide how much taking is too much without referring to the specific works in question.⁸² Not surprisingly then, in an effort to guide the determination of whether the copying is quantitatively and qualitatively sufficient to warrant a finding of substantial similarity,⁸³ courts have formulated several tests: the ordinary observer test,⁸⁴ the more discerning ordinary observer test,⁸⁵ the extrinsic/intrinsic test,⁸⁶ the total concept and feel test,⁸⁷ and the abstraction-filtration-comparison test.⁸⁸ In general, the goal of the substantial similarity tests is the same; but, in practice, each are applied differently in different circuits with different outcomes.⁸⁹

B. The Various Tests in the Various Circuits

Modern substantial similarity case law has been shaped, in large part, by the two major copyright courts:⁹⁰ the Second Circuit, which encompasses New York City—the world’s Mecca of art, entertainment, publishing, and fashion⁹¹—and the Ninth Circuit, home to both Silicon Valley and Hollywood.⁹² Consequently, this study’s discussion of modern U.S. substantial similarity case law is largely a discussion of the 122 opinions produced by the Second and Ninth Circuits, and the “progeny of these opinions in the

82. OSTERBERG & OSTERBERG, *supra* note 3, § 1:1.

83. *Id.*

84. *See, e.g.*, *Lapine v. Seinfeld*, No. 08Civ.128(LTS)(RLE), 2009 WL 2902584, at *5 (S.D.N.Y. Sept. 10, 2009) (applying the ordinary observer test).

85. *See* OSTERBERG & OSTERBERG, *supra* note 3, § 3:1.1.

86. *See, e.g.*, *Reece v. Island Treasures Art Gallery, Inc.*, 468 F. Supp. 2d 1197, 1204 (D. Haw. 2006) (applying the extrinsic/intrinsic test).

87. *Id.* at 1208-09; Daniel Su, Note, *Substantial Similarity and Architectural Works: Filtering Out “Total Concept and Feel,”* 101 Nw. U. L. REV. 1851, 1870-72 (2007). The total concept and feel test is part of the intrinsic test.

88. *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 706 (2d Cir. 1992) (creating the abstraction-filtration-comparison test).

89. *See infra* Subsection III.C.2.

90. Douglas Y’Barbo, *On the Legal Standard for Copyright Infringement*, 1999 UCLA J.L. & TECH. 3, 3 (“[T]he legal standard relied upon to determine copyright infringement is deeply fissured between the two major copyright courts—the Second and Ninth Circuits.”).

91. *See* Nicole Giambarrese, *The Look for Less: A Survey of Intellectual Property Protections in the Fashion Industry*, 26 TOURO L. REV. 243, 243, 245 (2010) (discussing New York City’s cultural status as an impetus for Second Circuit protections).

92. *See* William K. Ford, *Judging Expertise in Copyright Law*, 14 J. INTELL. PROP. L. 1, 41 (2006) (“Overall, the Second Circuit is the clear leader in terms of experience and influence. . . . [T]he Second Circuit consistently published at least 31.3% of the copyright opinions from the 1890s through the 1970s, more than any other circuit by wide margins. . . . The Ninth Circuit overtook the Second Circuit in the 1980s, publishing a little over 25% of the opinions.”).

other federal courts.”⁹³ The First, Third, Fifth, Seventh, and Eleventh Circuits apply the ordinary observer test,⁹⁴ which originated in the Second Circuit in *Arnstein v. Porter*.⁹⁵ The abstraction-filtration test⁹⁶ used in the Sixth and Tenth circuits originated from *Nichols v. Universal Pictures Corp.*, also in the Second Circuit.⁹⁷ The Fourth and Eighth Circuits follow the Ninth Circuit’s two-part, extrinsic/intrinsic substantial similarity test delineated in *Sid & Marty Krofft Television Productions, Inc. v. McDonald’s Corp.*⁹⁸ Still, despite having stemmed from landmark decisions of just two circuits, there are significant differences even within the major schools of thought.⁹⁹ The result is twelve federal circuit courts each with a unique approach to conducting the substantial similarity analysis.¹⁰⁰

1. *The Ordinary Observer Test*

The ordinary observer test, championed by the Second Circuit, has been adopted by the First, Third, Fifth, and Seventh Circuits.¹⁰¹ In deciding *Arnstein*, a dispute involving musical compositions,¹⁰² the Second Circuit held it would be inappropriate to determine infringement by comparing the songs “as they appear on paper” or by using the “judgment of trained musicians.”¹⁰³ Instead, because the musician’s “legally protected interest is . . . his interest in the potential financial returns from his compositions,” the substantial similarity determination should be made by the audience for whom the music is composed—the “lay listeners.”¹⁰⁴ Hence, the ordinary observer test attempts to compare the two works from the perspective of a hypothetical, average lay observer.¹⁰⁵

93. Beebe, *supra* note 10, at 568. In his empirical study of fair use opinions, Professor Beebe also found that the “opinions from courts of the Second and Ninth Circuits exerted a great deal of influence—much more than is generally thought—on fair use opinions outside of those circuits.” *Id.* at 567; *see also* OSTERBERG & OSTERBERG, *supra* note 3, § 3 (“Most courts use one of two tests: the copying/unlawful appropriation test associated with the Second Circuit or the extrinsic/intrinsic test associated with the Ninth Circuit.”).

94. OSTERBERG & OSTERBERG, *supra* note 3, § 3:1.

95. 154 F.2d 464, 468, 472-73 (2d Cir. 1946).

96. 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 9:94 (2012).

97. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

98. 562 F.2d 1157, 1164 (9th Cir. 1977); OSTERBERG & OSTERBERG, *supra* note 3, §

3:2.

99. *See infra* Subsections II.B.1-3.

100. *See infra* Subsections II.B.1-3.

101. OSTERBERG & OSTERBERG, *supra* note 3, § 3:1.

102. *Arnstein v. Porter*, 154 F.2d 464, 467 (2d Cir. 1946).

103. *Id.* at 473.

104. *Id.*

105. OSTERBERG & OSTERBERG, *supra* note 3, § 3:1.1[A] (“The ordinary observer test is no more than an attempt to gauge the reaction of the ordinary ‘man on the street’ to the

The Second Circuit developed a refined version of the ordinary observer test, the “more discerning” ordinary observer test, to address works that contain a substantial portion of unprotectable public domain material, in addition to protectable elements.¹⁰⁶ The more discerning ordinary observer test requires the fact finder to remove the unprotectable elements from consideration and determine, on the basis of the protectable elements that remain, whether the overall look and feel of the works are substantially similar.¹⁰⁷ This fact finder must compare the works from the perspective of the same hypothetical ordinary observer, but the observer must distinguish protectable expression from unprotectable public domain material.¹⁰⁸ Discerning protectable and unprotectable material is essential to the analysis; unless public domain elements are excluded from consideration, the fact finder will find similarities between elements that neither party “owns,” which could discourage the creation of derivative works based on public domain materials.¹⁰⁹

The First Circuit follows the Second Circuit’s step-by-step process,¹¹⁰ but it also frequently cites Ninth Circuit cases, as if unaware of the fissure between the two legal standards.¹¹¹ Like the Second Circuit, the First Circuit generally excludes expert testimony in its application of the ordinary observer test.¹¹² Unlike the Second Circuit, the First Circuit does not expressly apply the more discerning ordinary observer test to cases involving both protectable and unprotectable elements.¹¹³ However, it does mandate that “only similarities between protected expression” are to be evaluated.¹¹⁴ Further, the First, Third, and Seventh Circuits evaluate infringement on a slid-

two works. . . . The fact finder decides whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.”)

106. *Boisson v. Banian, Ltd.*, 273 F.3d 262, 265, 268-69, 272-73 (2d Cir. 2001) (considering elements of copyrighted quilt taken from public domain); *Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 129-30, 134-35 (2d Cir. 2003) (considering elements of carpets taken from public domain and finding infringement).

107. *OSTERBERG & OSTERBERG*, *supra* note 3, § 3:1.1[B].

108. *Id.*

109. *See Folio Impressions, Inc. v. Byer Cal.*, 937 F.2d 759, 764-66 (2d Cir. 1991) (directing the trier of fact to factor out the unprotectable elements and to consider only the protectable elements); *Knitwaves, Inc. v. Lollytogs, Ltd.*, 71 F.3d 996, 1003 (2d Cir. 1995) (noting that if one “dissected” works of visual art too far the result would be a finding that says “there can be no originality in a painting because all colors of paint have been used somewhere in the past.” (quoting Transcript of Record at 4, *Knitwaves, Inc. v. Lollytogs, Ltd.*, (1992) (No. 92 Civ. 6285 (JSM)), 1994 WL 256611)).

110. *OSTERBERG & OSTERBERG*, *supra* note 3, § 3:1.2.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

ing scale.¹¹⁵ On one end of the scale, when an idea can only be expressed in one way, “merger bars any claim of infringement.”¹¹⁶ Moving down the scale, “[w]hen the idea and its expression are not completely inseparable, there may still be only a limited number of ways of expressing the idea,” in which case the plaintiff carries the burden of showing “near identity” between the works at issue.¹¹⁷ At the opposite end of the scale, the plaintiff is granted broad protection for works that embody only one of infinite ways of expressing an idea.¹¹⁸

The Third Circuit likewise analyzes substantial similarity as the Second Circuit does, despite its inconsistent semantics.¹¹⁹ Uniquely, cases in the Third Circuit tend to involve factual works,¹²⁰ and—regardless of the subject matter—courts evaluate substantial similarity via a side-by-side comparison of the works, examining them as they would appear to an ordinary observer.¹²¹ The Third Circuit is perhaps most well-known for its unique approach to analyzing computer programs, created in *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.*¹²²

The Fifth Circuit has adopted both the Second Circuit’s ordinary observer test and the more discerning ordinary observer test.¹²³ However, in the Fifth Circuit, if the plaintiff fails to “produce the works for a side-by-side comparison, he cannot prevail.”¹²⁴ Such a requirement is mandated in only two other circuits, the Seventh and the Eleventh,¹²⁵ and has been criticized for its potential to exterminate meritorious claims.¹²⁶

115. *Id.*; *Ford Motor Co. v. Summit Motor Products, Inc.*, 930 F.2d 277, 290 (3d Cir. 1991); *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 908 (3d Cir. 1975) (stating “[i]f the quantum of originality” in plaintiff’s work is very modest, more substantial similarity is required for there to be infringement (citing *Thomas Wilson & Co. v. Irving J. Dorfman Co.*, 268 F. Supp. 711, 713 (S.D.N.Y. 1967))).

116. OSTERBERG & OSTERBERG, *supra* note 3, § 3:1.3.

117. *Id.* (quoting *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 606 (1st Cir. 1988)).

118. *Id.*

119. *Id.* The term “substantial similarity” has two meanings in the Third Circuit. 3 PATRY, *supra* note 96, § 9:165. “[S]ubstantial similarity to show that the original work has been copied is not the same as substantial similarity to prove infringement” (unlawful appropriation).” *Id.* § 9:166.

120. 3 PATRY, *supra* note 96, § 9:165.

121. OSTERBERG & OSTERBERG, *supra* note 3, § 3:1.3.

122. 797 F.2d 1222, 1224 (3d Cir. 1986); *see also* 3 PATRY, *supra* note 96, § 9:165 (“*Whelan Associates Inc. v. Jaslow Dental Laboratory* set off an avalanche of litigation, which was subsequently stopped cold by the Second Circuit’s forceful rejection of *Whelan* in its 1992 *Computer Associates Int’l v. Altai, Inc.* opinion . . .”).

123. OSTERBERG & OSTERBERG, *supra* note 3, § 3:1.4; 3 PATRY, *supra* note 96, § 9:186.

124. OSTERBERG & OSTERBERG, *supra* note 3, § 3:1.4.

125. *Id.*

126. Roodhuyzen, *supra* note 56, at 1396 (“As evidenced in *Gen. Universal Sys.*, the side-by-side approach articulated by the Fifth Circuit has the potential to throw out of court

The Seventh Circuit, said to be “a flagship court of appeals in copyright jurisprudence” due to its “well-thought out” opinions,¹²⁷ adheres to a hybrid approach between the Second and the Fifth Circuits.¹²⁸ The Seventh Circuit uses the ordinary observer test, and though it does not expressly apply the more discerning ordinary observer test to disputes involving both protectable and unprotectable elements, its actual analysis does not differ significantly from the Second Circuit.¹²⁹ Different from the other circuit courts that follow the ordinary observer test, the Seventh Circuit considers dissimilarities in addition to the overall similarities, reasoning that “numerous differences tend to undercut the likelihood of substantial similarity and are thus relevant considerations.”¹³⁰ The Seventh Circuit is distinctive in holding that copyrighted works have a “trademark-law-type range of protection.” The Seventh Circuit considers a plaintiff’s work “weak and protected only from identical copying or very close paraphrasing” if the idea and expression are indistinguishable, but considers the work stronger and worthy of broader protection as it embodies more “particularized expression.”¹³¹

2. The Extrinsic/Intrinsic Test

The extrinsic/intrinsic test emerged as the 1977 brainchild of the Ninth Circuit in *Sid & Marty Krofft Television Productions, Inc.*¹³² and has been adopted by the Fourth and Eighth Circuits.¹³³ In affirming the infringement of the children’s television show, *H.R. Pufnstuf*, by McDonald’s *McDonaldland*, the court created a bifurcated test.¹³⁴ First, the fact finder conducts an “extrinsic” comparison of the works’ similarities between ideas; and second, the fact finder makes an “intrinsic,” purely subjective, assessment of whether the “total concept and feel” of the two works are substantially similar from the perspective of a hypothetical ordinary and reasonable person.¹³⁵ The “extrinsic test” requires the court to determine, with the assis-

possibly meritorious claims on the basis that the party cannot provide the alleged infringing work to do a side-by-side comparison.”)

127. 3 PATRY, *supra* note 96, § 9:210 (referencing two Seventh Circuit opinions, *Selle v. Gibb* and *Aurora World, Inc. v. Ty Inc.* that are a “textbook of their own on infringement and fair use”).

128. OSTERBERG & OSTERBERG, *supra* note 3, § 3:1.5.

129. *Id.*

130. *Sanford v. CBS, Inc.*, 594 F. Supp. 713, 717 (N.D. Ill. 1984); *see also* *Scott v. WKJG, Inc.*, 376 F.2d 467, 469 (7th Cir. 1967).

131. OSTERBERG & OSTERBERG, *supra* note 3, § 3:1.5 (“The other circuits that have sanctioned this trademark-law-type range of protection are the First and Third Circuits.”).

132. *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977).

133. OSTERBERG & OSTERBERG, *supra* note 3, §§ 3:2.2 to .3.

134. *Id.* § 3.2.1[A].

135. *Id.*; *see also* *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1984).

tance of expert testimony, whether the ideas are substantially similar by objectively dissecting, listing, and comparing the ideas used in each work.¹³⁶ The “intrinsic test” compares the overall expression of the two works, excluding expert testimony and dissection.¹³⁷ In *Shaw v. Lindheim*, “after 13 years of bad experiences with *Krofft*,” the Ninth Circuit modified the extrinsic/intrinsic test.¹³⁸ The Court explained that the extrinsic test does not compare the works’ ideas themselves, rather it determines whether there is any similarity in the expression of those elements.¹³⁹ The Court clarified the intrinsic test as the “visceral reaction” of an ordinary observer “virtually devoid of analysis.”¹⁴⁰ Thus, unlike other formulations of the infringement test, the Ninth Circuit analyzes ideas and expression in the first step, but only expression in the second step.¹⁴¹ While the intrinsic test apparently compares the works “as a whole,” the unprotectable elements are not included in the analysis—a conflict with the ordinary observer test, which simply compares the works from the perspective of an ordinary observer.¹⁴²

Though the extrinsic/intrinsic test has been criticized as infinitely complicated¹⁴³ and “often difficult to apply,”¹⁴⁴ the Fourth Circuit has adhered to the test as it is explained in *Litchfield v. Spielberg*.¹⁴⁵ Under the Fourth Circuit’s extrinsic test, the plaintiff must show that the works “contain substantially similar ideas that are subject to copyright protection,” and the test requires the court to list and compare the elements of the works.¹⁴⁶ Once extrinsic similarity has been established, the Fourth Circuit, like the Ninth, tests intrinsic similarity by comparing the “total concept and feel” of the works.¹⁴⁷ Significantly, however, the Fourth Circuit’s intrinsic test evaluates substantial similarity from the perspective of the intended audience of the works, which is not necessarily the ordinary observer.¹⁴⁸ The “intended

136. OSTERBERG & OSTERBERG, *supra* note 3, § 3:2.1[A] (“For works of visual art . . . [s]uch criteria include the type of artwork involved, the materials used, the subject matter and the setting for the subject.”) (quoting *Krofft*, 562 F.2d at 1164)); *see also* *Aurora World, Inc. v. Ty Inc.*, 719 F. Supp. 2d 1115, 1134 (C.D. Cal. 2009).

137. OSTERBERG & OSTERBERG, *supra* note 3, § 3:2.1[A].

138. 3 PATRY, *supra* note 96, § 9:235.

139. OSTERBERG & OSTERBERG, *supra* note 3, § 3:2.1[B].

140. *Id.*

141. 3 PATRY, *supra* note 96, § 9:235.

142. *Id.* Professor Patry questions how the works can be compared as a whole when all of the unprotectable elements have been filtered out. *Id.*

143. *Id.* (stating that even though both the Second Circuit and the Ninth Circuit use a two-step analysis, the two tests bear no resemblance to each other).

144. OSTERBERG & OSTERBERG, *supra* note 3, § 3:2.1[H] (“The application of the extrinsic test . . . is a somewhat unnatural task, guided by relatively little precedent.”).

145. *Id.* § 3:2.2.

146. *Id.*

147. *Id.*

148. *Id.*

audience” test, as it is called, is reserved for cases in which the intended audience possesses “specialized expertise” that the average observer lacks.¹⁴⁹ At present, the intended audience test has only been applied in decisions involving children’s works¹⁵⁰ and computer programs.¹⁵¹

The Eighth Circuit also applies the extrinsic/intrinsic test, but it uses an interpretation of the test similar to the Fourth Circuit.¹⁵² The Eighth Circuit has not applied the Fourth Circuit’s intended audience test,¹⁵³ and copyright litigation in the circuit is fairly sparse.¹⁵⁴

3. The Abstraction-Filtration-Comparison Test

The abstraction-filtration-comparison test was adopted in modified form by the Second Circuit in *Computer Associates International v. Altai, Inc.*¹⁵⁵ in reaction to the “overly expansive approach to software protection”¹⁵⁶ invoked by the Third Circuit in *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.*¹⁵⁷ The test has since been adopted by the Tenth, Sixth, and D.C. Circuits and applied to cases involving a variety of subject matters.¹⁵⁸ Under the Tenth Circuit’s abstraction-filtration-comparison test,

149. *Id.* § 3:2.2[A].

150. Adults are not always the intended audience for a work. *See id.* § 3:2.2[C]. In claims involving products intended for children, the children themselves are the best judges of substantial similarity. *Id.* Therefore, in a dispute involving similar costumes resembling Barney, the jolly, big purple dinosaur character in a popular television show for children, the Fourth Circuit reversed, holding that the costumes should have been compared from the point of view of their intended audience—children. *Id.*

151. *Id.* For instance, in *Integral Systems, Inc. v Peoplesoft, Inc.*, a reasonable person to compare the computer software works at issue would be a person with knowledge of human resource management systems. *See* OSTERBERG & OSTERBERG, *supra* note 3, § 3:2.2; *see also* *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 982 F.2d 693, 713 (2d Cir. 1992).

152. OSTERBERG & OSTERBERG, *supra* note 3, § 3:2.3. The Eighth Circuit takes its version of the extrinsic/intrinsic test from *Moore v. Columbia Pictures Industries, Inc.*, an Eighth Circuit case decided after *Krofft* and before *Shaw*. *Id.*

153. *See id.* But *see* 3 PATRY, *supra* note 96, § 9:224 (“The Eighth Circuit does not see a great deal of copyright litigation, but the court of appeals’ opinions have been very well-thought out, traditional efforts, generally following the Second Circuit’s two-step approach to infringement analysis.”).

154. 3 PATRY, *supra* note 96, § 9:224.

155. *Id.* § 9:94.

156. *Id.*

Regrettably, however, egged on by a grandiose claim that courts should apply the abstraction-filtration-comparison “across the gamut of copyright law,” its acceptance has begun to spread. So far the application and/or misapplication of the doctrine has been worse in the Tenth Circuit, which has applied the test to cartoon strips, paper dolls, and telephone directories.

Id. (quoting 4 NIMMER & NIMMER, *supra* note 67, § 13.03[F][1] (2012)).

157. 797 F.2d 1222, 1224-25 (3d Cir. 1986).

158. OSTERBERG & OSTERBERG, *supra* note 3, § 3:3.

the fact finder looks at the elements of the work generally, or in the “abstract,” separating protectable expression from unprotectable ideas.¹⁵⁹ Then, unprotectable elements are filtered from the original expression,¹⁶⁰ and the remaining protectable elements are compared to the allegedly infringing work, from the perspective of the ordinary observer, to determine if the works are substantially similar.¹⁶¹

In *Kohus v. Mariol*,¹⁶² the Sixth Circuit announced its new standard—a variation on the abstraction-filtration-comparison—in 2003.¹⁶³ The test, sometimes called “filtration/comparison by intended audience,” involves two parts.¹⁶⁴ First, the court identifies the protectable elements of the plaintiff’s work and, in the same step, filters out the unoriginal, unprotectable elements.¹⁶⁵ Second, the works are compared from the perspective of the intended audience.¹⁶⁶ In both steps, expert testimony may be admitted.¹⁶⁷

The D.C. Circuit is confronted with less traditional copyright litigation than the other circuits,¹⁶⁸ but it generally applies a two-step filtration/comparison test in which the comparison of the filtered elements and the overall look and feel of the works are gauged by an ordinary observer.¹⁶⁹ However, in cases where the plaintiff’s work does not contain unprotectable elements, the D.C. Circuit simply applies the ordinary observer test of the Second Circuit.¹⁷⁰

The approaches of the Eleventh Circuit and the Federal Circuit Court of Appeals cannot be characterized by a single substantial similarity test. The Eleventh Circuit advocates an “ad hoc” approach that is consistent with

159. *Id.* § 3:3.1.

160. *Id.* In terms of a literary work, such unprotectable ideas to be filtered out from the final comparison between the protectable expressions of the two works may include common plots and themes, historical facts in the public domain, and *scènes à faire*.

161. OSTERBERG & OSTERBERG, *supra* note 3, § 3:3.1.

162. 328 F.3d 848 (6th Cir. 2003).

163. OSTERBERG & OSTERBERG, *supra* note 3, § 3:3.2. “Until 2003, the Sixth Circuit had not adopted a specific test for analyzing substantial similarity in copyright cases,” nor did its district courts consistently apply a single test. *Id.* “Most evaluated substantial similarity by means of the ordinary observer test,” but some also used the Ninth Circuit extrinsic/intrinsic test. *Id.*

164. *Id.*

165. *Id.* (“The court specifically identified ideas, elements dictated by efficiency, and *scènes à faire* as elements to be filtered out before comparing the works. In a later case, *Murray Hill Publ’ns, Inc. v. Twentieth Century Fox Film Corp.*, the court added another item to the list of elements to be filtered— independently created elements.” (footnote omitted)).

166. *Id.*

167. *Id.*

168. 3 PATRY, *supra* note 96, § 9:267 (“There is little traditional copyright litigation in the District of Columbia Circuit.”).

169. OSTERBERG & OSTERBERG, *supra* note 3, § 3:3.3.

170. *Id.*

the “traditional analysis,”¹⁷¹ generally treating copyright infringement as “a question of fact for the jury to decide.”¹⁷² Alternatively, the Federal Circuit Court of Appeals applies the law of the jurisdiction from which the appeal is taken.¹⁷³

III. DISCUSSION AND ANALYSIS OF THE EMPIRICAL RESULTS

A. Availability of Relevant Resources

Since this empirical study is the first to address the substantial similarity tests and related case law, much of the methodology necessarily follows from other works of statistical legal scholarship.¹⁷⁴ There are resources, some more comprehensive than others, on different types of intellectual property: the U.S. Patent and Trademark Office offers searchable online databases for trademarks and patents;¹⁷⁵ the University of Houston Law Center and the Stanford Intellectual Property Litigation Clearinghouse each provide private online databases that offer information and statistics about patent disputes;¹⁷⁶ the official directory of the U.S. federal courts provides annual reports and statistics;¹⁷⁷ and there are scholarly articles with statistical analyses that focus on patents,¹⁷⁸ trademarks,¹⁷⁹ trade secrets,¹⁸⁰ and the

171. 3 PATRY, *supra* note 96, § 9:258 (“Case law in the Eleventh Circuit is mostly devoid of the tendency in other events to announce grand infringement tests . . .”).

172. OSTERBERG & OSTERBERG, *supra* note 3, § 3:4.1.

173. *Id.* § 3:5.

174. Parts of this study were modeled after and benefited greatly from Professor Beebe’s empirical scholarship of fair use opinions. See Beebe, *supra* note 10, at 582-97; see also Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 100-20 (2008) (presenting best practices after collecting examples of empirical legal scholarship that analyzed judicial opinions as part of a content analysis); David S. Almeling et al., *A Statistical Analysis of Trade Secret Litigation in Federal Courts*, 45 GONZ. L. REV. 291, 295-301 (2009).

175. The U.S. Patent & Trademark Office permits the searching of patents at <http://patft.uspto.gov/> and trademarks at <http://tess2.uspto.gov/>. The U.S. Copyright Office permits searching at <http://www.copyright.gov/records/>.

176. The University of Houston Law Center provides statistics on forty issues in patent cases at <http://www.patstats.org/>, and the Stanford Intellectual Property Litigation Clearinghouse offers information about IP disputes within the United States at <http://www.law.stanford.edu/program/centers/ipcl/>.

177. The annual reports and statistics of the U.S. federal courts can be found at <http://www.uscourts.gov/Statistics.aspx>; the U.S. Patent & Trademark Office provides annual statistics relating to patents and trademarks at <http://www.uspto.gov/about/stats/index.jsp>; and annual statistics of the U.S. Copyright Office can be found at <http://www.copyright.gov/reports/>.

178. See John R. Allison & Mark A. Lemley, *Who’s Patenting What? An Empirical Exploration of Patent Prosecution*, 53 VAND. L. REV. 2099, 2100 (2000).

179. See Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581, 1582 (2006); Ash Nagdev, *Statistical Analysis of the*

fair use doctrine in copyright law.¹⁸¹ Yet, despite the wealth of available information pertaining to other intellectual property doctrines and notwithstanding the enormous amount of scholarly criticism that the substantial similarity tests and cases have received, there lacks any empirical resources or comprehensive account of substantial similarity case law.

The reasons for this deficiency are numerous, but two are key. First, while the Administrative Office of the United States Courts and the Federal Judicial Center do systematically track data for patent, trademark, and copyright cases, it does so only generally.¹⁸² That is, all copyright actions are indiscriminately aggregated into a single category under the broad umbrella of copyright law, such that fair use cases, copyrightability cases, and substantial similarity cases are indistinguishable from one another.¹⁸³ Second, the concept of substantial similarity does not easily lend itself to statistical analysis; there is no uniform standard. Unlike the likelihood of confusion test used to analyze trademark infringement claims, there are no prongs; and, unlike the fair use test of copyright infringement, there are no specific factors.¹⁸⁴ Instead, not only are there several substantial similarity tests employed throughout the circuits, but also each circuit can be inconsistent in its application of a particular test, resulting in opinions that—on the whole—seem too scattered to code and classify reliably. There can be no doubt that these difficulties, coupled with the “necessary vagueness of the substantiality inquiry,”¹⁸⁵ have hindered a clean-cut analysis of substantial similarity case law, but such hardships by no means preclude a thorough empirical study with important preliminary results.¹⁸⁶

United States' Accession to the Madrid Protocol, 6 NW. J. TECH. & INTELL. PROP. 211, 214 (2008).

180. See Almeling et al., *supra* note 174, at 301.

181. See generally Beebe, *supra* note 10.

182. See Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455, 1456 (2003); Almeling et al., *supra* note 174, at 296 (noting that the “data include information about every case filed in federal courts, such as the subject matter of the case, the parties, and outcome”).

183. Almeling et al., *supra* note 174, at 296.

184. Beebe, *supra* note 10, at 556.

185. 3 PATRY, *supra* note 96, § 9:64 (noting that “no a priori line can be fixed to determine when appropriation is substantial”); see, e.g., *Story v. Holcombe*, 23 F. Cas. 171, 172 (C.C.D. Ohio 1847); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

186. In fact, research has uncovered a small number of substantial similarity analyses that have, in some way, contributed data relative to substantial similarity.

B. Analysis of Substantial Similarity Opinions by Year

This empirical study set out to include all reported federal appellate court opinions that made a ruling on the issue of substantial similarity and applied one of the several substantial similarity tests. Since there was no pre-built search or previous study listing all substantial similarity cases meeting these criteria, an over-broad search was conducted,¹⁸⁷ and any unsuitable cases were removed. Collecting the most frequently cited cases and eliminating those that made no ruling on the issue of substantial similarity resulted in a preliminary data set of 338 circuit court cases. Cases that were decided under a different rule of law, such as copyrightability or striking similarity, were also removed, leaving a total of 234 circuit court cases spanning from April 2, 1923 to September 14, 2011.¹⁸⁸

1. *Distribution of Substantial Similarity Opinions by Year*

Importantly, over 80% of the 234 appellate opinions collected—spanning from 1923 to 2011—were issued from 1980 to 2011, equating to a surprisingly low, yet explicable, average of 6.5 opinions per year during the thirty-one year period, with an average of 1.9 opinions per year ruling for the copyright holders in finding substantial similarity.¹⁸⁹ Figure 1 shows the

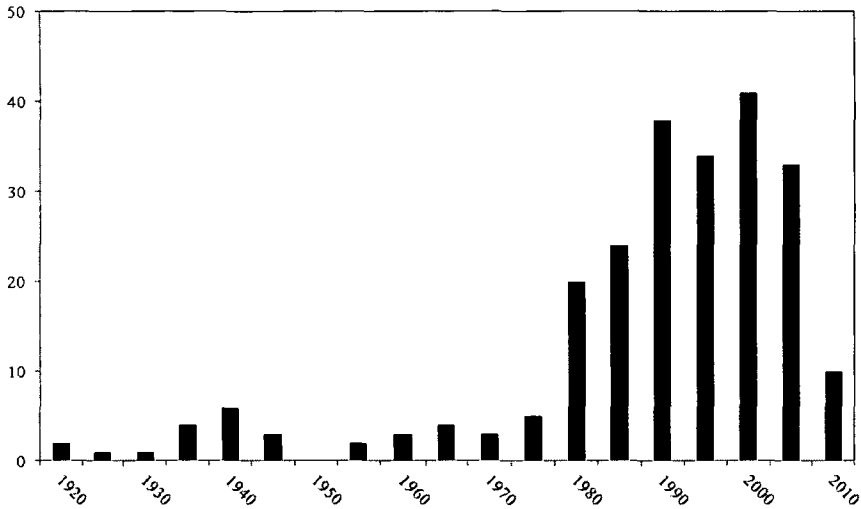
187. To collect a sample of the relevant opinions, I ran the following Lexis search in the Lexis Federal Circuit Court Cases, Combined database: copyright and “substantial! similar!” and date(geq (4/23/1923) and leq(9/14/2011)). I then ran the following Westlaw search in the Westlaw All Federal Circuit Court Cases database: copyright & “substantial! similar!” & da(aft 1923) & da(bef 2011). I then reviewed the Lexis and Westlaw search results to identify any opinions reported uniquely in either Lexis or Westlaw. This review yielded a total 338 opinions from the two databases. Along with research assistants, I then read each of these opinions to exclude those that did not involve in any way an issue of copyright substantial similarity and excluded additional opinions as irrelevant or only marginally relevant to copyright substantial similarity. Of the remaining opinions, 234 made considerable use of a substantial similarity test. Research assistants then coded each of the opinions directly into an Excel 2010 SP2 spreadsheet according to a coding instrument, did the same in a new spreadsheet a second time, and then I compared the two spreadsheets for errors. The coding instrument was designed to record general data about the opinion (e.g., caption, citation, judge, venue, posture, brief summary of the facts) and copyright-specific data about the opinion (e.g., the substantial similarity test applied by the court, the disposition of the infringement claim, type of subject matter involved in the claim). The coding instrument and Excel spreadsheet are available upon request from the author.

188. According to one Westlaw representative, Westlaw’s database includes comprehensive coverage of all reported and published decisions since 1789. See Mary Rumsey, *A Guide to Fee-Based U.S. Legal Research Databases*, GLOBALEX (last updated Mar. 2010), http://www.nyulawglobal.org/Globalex/US_Fee-Based_Legal_Databases1.htm (“Westlaw generally offers complete coverage back to the earliest case.”). Thus, the fact that there are so few cases in earlier years is likely not a sampling issue.

189. Beebe, *supra* note 10, at 565 (explaining that the disparity between the high approximate number of copyright infringement complaints and the “paucity of reported fair

distribution by year of the 234 circuit court opinions studied. The data shows a significant jump in the average number of substantial similarity opinions after 1980, which peaks in the early 2000s.

Figure 1: Distribution of Circuit Court Opinions by Year



One explanation for the increase in opinions after 1980 is the appearance of substantial similarity decisions involving computer software, which began to surface in the early 1980s.¹⁹⁰ A similar trend was noted by at least one scholar with the appearance of fair use case law involving computer software in 1988, followed by disputes involving Internet technology.¹⁹¹ Furthermore, although fair use is a copyright law doctrine separate from the concept of substantial similarity, it is hardly unlikely that the United States Supreme Court's four majority opinions addressing fair use between 1984 and 1994 did not have some effect on the influx of substantial similarity decisions during this time.¹⁹² The early 2000s peak in the data may reflect,

use opinions" is likely due to the fact that many fair use disputes are "chilled" by the mere threat of litigation). Such a tendency is likely to also translate to substantial similarity case law. See MARJORIE HEINS & TRICIA BECKLES, *WILL FAIR USE SURVIVE?: FREE EXPRESSION IN THE AGE OF COPYRIGHT CONTROL* 8, 35-36 (2005), available at <http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf>. (assessing the speech-suppressing effects of cease-and-desist letters though empirical research).

190. See, e.g., *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 911 (2d Cir. 1980); *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir. 1985); *Steinberg v. Columbia Pictures Indus., Inc.*, 663 F. Supp. 706, 711 (S.D.N.Y. 1987); *Selle v. Gibb*, 741 F.2d 896, 900 (7th Cir. 1984); *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984).

191. Beebe, *supra* note 10, at 566.

192. *Id.*

at least in part, the “RIAA Bump.”¹⁹³ In the five-year period between 2003 and 2008, U.S. copyright cases nearly doubled as the Recording Industry Association of America (RIAA) launched its “litigation campaign” against online file sharers.¹⁹⁴ Though RIAA lawsuits admittedly fall under a copyright infringement cause of action separate from the substantial similarity doctrine,¹⁹⁵ it is worth noting that 19.5% of this study’s substantial similarity opinions issued between 2003 and 2008 involve music. This is a notable difference from the previous five years, between 1997 and 2002, in which only 12.5% of the opinions involve music. But while the recording industry’s aggressive legal strategy reached its height in 2005, and new federal copyright infringement lawsuits have dropped every year thereafter,¹⁹⁶ independent filmmakers are now following suit, launching “an RIAA-style mass-litigation campaign” against thousands of BitTorrent¹⁹⁷ users who have illegally downloaded movies from the Internet.¹⁹⁸ Thus, given the constant flow of innovative technologies and new media, it would be unreasonable to expect the number of copyright infringement dockets to return to a pre-1980 status any time soon.

2. Substantial Similarity Win Rates by Year

Of the 234 opinions studied, 32.3% found copyright infringement on the basis of substantial similarity, while the copyright holder lost on the substantial similarity claim in 67.7% of the cases. Figure 2 sets out the percentage of opinions in which substantial similarity was found for each of the nine decades between 1920 and 2010. From the 1930s through the 1970s, the percentage of opinions finding substantial similarity increased by an average of 8.6% each decade, with the peak occurring in the 1970s, during which 62.5% of the decisions fell in favor of the copyright holder. Yet, this

193. David Kravets, *Copyright Lawsuits Plummet in Aftermath of RIAA Campaign*, WIRED (May 18, 2010, 1:24 PM), <http://www.wired.com/threatlevel/2010/05/riaa-bump/>.

194. *Id.*

195. Recording Indus. Ass’n of Am., Inc. v. Verizon Internet Servs., Inc., 351 F.3d 1229, 1231 (D.C. Cir. 2003).

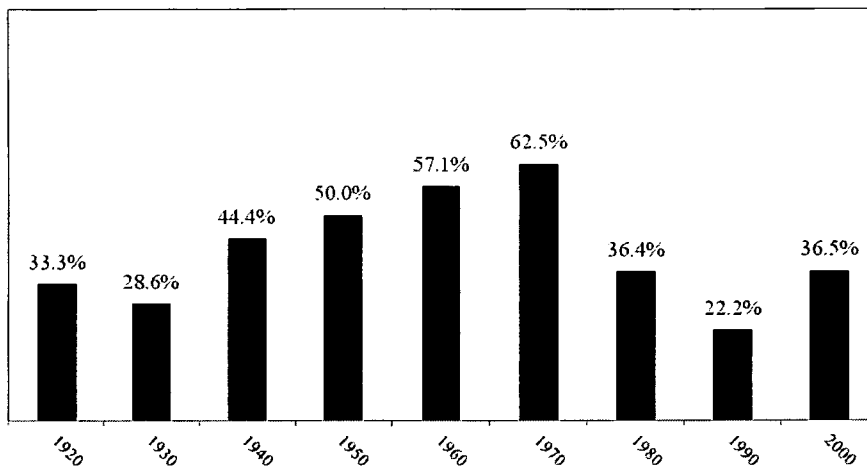
196. The drop in litigation might also be partly a product of the recession. “In interviews with Threat Level, copyright attorneys were in agreement that the termination of the litigation campaign is largely responsible for last year’s low numbers, though economic conditions may also have played a role. ‘When economic times are bad, lawsuits drop,’ says New York copyright attorney Ray Dowd.” Kravets, *supra* note 193.

197. *Id.* BitTorrent is one of the most common file sharing protocols on the Internet. Hyunggon Park, Rafit Izhak Ratzin, & Mihaela van der Schaar, *Peer-to-Peer Networks—Protocols, Cooperation and Competition*, 1, 2 http://medianetlab.ee.ucla.edu/papers/chapter_P2P_hpark.pdf.

198. David Kravets, *Indie Filmmakers Sue Thousands of BitTorrent Users*, WIRED (Mar. 31, 2010, 12:16 PM), <http://www.wired.com/threatlevel/2010/03/bittorrent-legal-attack/>.

peak was met with a sharp decline beginning in the 1980s, with only 36.4% of opinions finding substantial similarity, and even fewer in the 1990s.

Figure 2: Percentage of Opinions Finding Substantial Similarity by Decade



One possible explanation for the steady increase from the 1930s through the 1970s is the introduction and assimilation of several early landmark decisions, including *Nichols v. Universal Pictures Corp.* in 1930,¹⁹⁹ *Sheldon v. Metro-Goldwyn Pictures Corp.* in 1936,²⁰⁰ and *Arnstein v. Porter* in 1946.²⁰¹ Although *Nichols*, the earliest of the three, ruled in the defendant's favor, holding that "the defendant took no more—assuming that it took anything at all—than the law allowed,"²⁰² both the *Sheldon* and *Arnstein* held in favor of the copyright holder.²⁰³ Such decisions may have been influential in the willingness of subsequent courts to find infringement on the basis of substantial similarity, at least until the 1980s.

199. 45 F.2d 119, 120 (2d Cir. 1930).

200. 81 F.2d 49, 50-52 (2d Cir. 1936) (reversing the district court's finding and holding that the defendant's photoplay, *Letty Lynton*, was substantially similar to the plaintiff's play, *Dishonored Lady*, both of which involved the acquittal of a wanton young woman who poisoned her lover).

201. 154 F.2d 464, 473 (2d Cir. 1946) (reversing the district court's finding that the defendant's songs were not substantially similar, and remanding the case for a jury trial since the decision as to whether the two songs were substantially similar enough to constitute infringement was a matter of fact for the jury to decide).

202. *Nichols*, 45 F.2d at 121. "A comedy based upon conflicts between Irish and Jews, into which the marriage of their children enters, is no more susceptible of copyright than the outline of *Romeo and Juliet*." *Id.* at 122.

203. *Sheldon*, 81 F.2d at 56; *Arnstein*, 154 F.2d at 473.

Still another distinguishing characteristic of the opinions published between the 1930s and the 1970s is the application of the ordinary observer test in nearly all of the decisions. It was not until the late 1970s that other substantial similarity tests began to proliferate in the judicial landscape. Of course, pre-1980s case law also dealt with a more limited variety of subject matters, which included neither computer programs nor architectural works,²⁰⁴ and may have resulted in simpler, easier-to-decide substantial similarity determinations.²⁰⁵

Figure 3 excludes opinions decided before 1970 to provide a more detailed illustration of the substantial similarity win rates over the forty-year period between 1970 and 2010. As shown, the percentage of cases in which copyright holders prevailed declined precipitously throughout the 1970s and most of the 1990s. Substantial similarity win rates were lowest during the five-year period between 1995 and 2000, with only 21.6% of the opinions finding substantial similarity. Such a significant downturn may reflect the impact of then-recent decisions that either outlined a new test or applied an old test in a new way. Sure enough, of the aforementioned opinions in which new substantial similarity tests were delineated, only *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*²⁰⁶ and the lesser-cited *Country Kids 'N City Slicks, Inc. v. Sheen*²⁰⁷ favored the copyright holder, finding substantial similarity. Conversely, both *Folio Impressions, Inc. v. Byer California*²⁰⁸ and *Computer Associates International, Inc. v. Altai, Inc.*²⁰⁹ upheld bench trial verdicts favoring the defendants, plausibly ushering in the trend toward lower substantial similarity win rates.

204. Subject matter categories included in pre-1980s case law are literary works, factual works, musical works, and graphic works (graphic, pictorial, and sculptural works).

205. See Gable, *supra* note 29, at 447 (describing “a state of creative ferment concerning the methods by which nonliteral elements of computer programs may be identified and analyzed for copyrightability” (quoting *Eng’g Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1341 (5th Cir. 1994))); Jack E. Brown, “Analytical Dissection” of Copyrighted Computer Software—Complicating the Simple and Confounding the Complex, 25 ARIZ. ST. L.J. 801, 822 (1993).

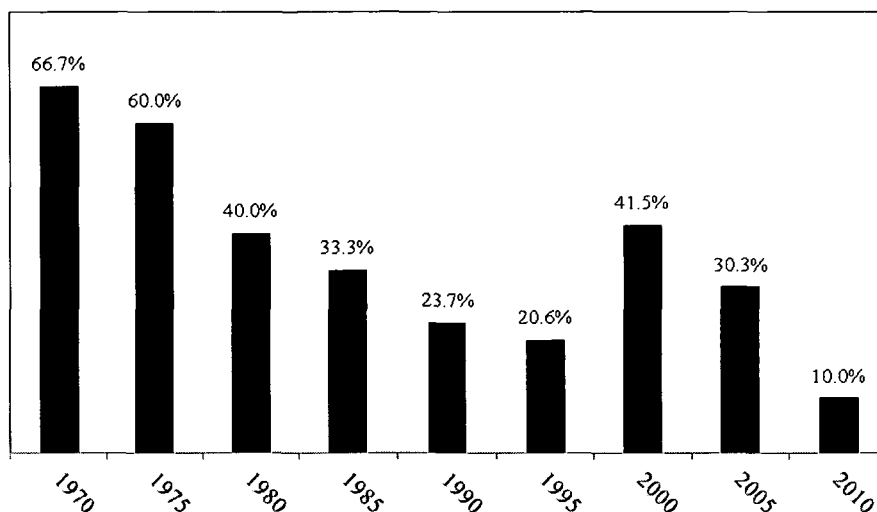
206. 562 F.2d 1157, 1161 (9th Cir. 1977) (affirming the district court’s jury trial verdict finding substantial similarity between the defendant’s “McDonaldland” advertising campaign and the plaintiff’s children’s television show, “H. R. Pufnstuf”).

207. 77 F.3d 1280, 1282-83 (10th Cir. 1996).

208. 937 F.2d 759, 761-62 (2d Cir. 1991).

209. 982 F.2d 693, 696-97 (2d Cir. 1992).

**Figure 3: Substantial Similarity
Win Rates, 1970-2010**



A final observation concerning the substantial similarity win rates between 1970 and 2010 deserves exploration that is beyond the scope of this study, but is nonetheless worth mentioning. During this forty-year period, five U.S. Supreme Court cases addressing copyright law were published—one of them involving copyrightability—*Feist Publications, Inc. v. Rural Telephone Service Co.* (1991)²¹⁰—and four of them involving fair use—*Sony Corp. of America v. Universal City Studios, Inc.* (1984),²¹¹ *Harper & Row, Publishers, Inc. v. Nation Enterprises* (1985),²¹² *Stewart v. Abend* (1990),²¹³ and *Campbell v. Acuff-Rose Music, Inc.* (1994).²¹⁴ The Supreme Court ruled in favor of the copyright holder in only two of these cases, namely *Harper & Row, Publishers* and *Stewart*,²¹⁵ while holding in favor of the alleged infringer in *Feist Publications*, *Sony*, and *Campbell*, thus conceivably expanding the toolkit of defenses available to an alleged infringer.²¹⁶ Although the data set collected for this study was not designed to cre-

210. 499 U.S. 340, 363 (1991) (holding that data compiled in telephone directory were uncopyrightable facts).

211. 464 U.S. 417, 454-55 (1984).

212. 471 U.S. 539, 569 (1985) (holding that unauthorized publication of key verbatim selections from unpublished presidential memoirs was not a fair use).

213. 495 U.S. 207, 236 (1990).

214. 510 U.S. 569, 571-72 (1994) (holding that the musical group 2 Live Crew's appropriation of certain elements of Roy Orbison's song "Oh, Pretty Woman" in its parody of the song constituted a fair use).

215. See *Harper & Row, Publishers*, 471 U.S. at 542; *Stewart*, 495 U.S. at 238.

216. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 364 (1991); *Sony Corp. of Am.*, 464 U.S. at 420-21; *Campbell*, 510 U.S. at 572.

ate a link between substantial similarity case law and other copyright doctrines, it is possible that such a link exists. Substantial similarity and fair use no doubt occupy two distinct and conceptually insulated tiers of infringement analysis, but *Campbell*, the most prominent copyright opinion written in decades, may have tipped the scale in favor of the alleged infringers. By ruling for the defendant parodist and against the copyright holder, *Campbell* gave public interests priority in the balance between public interests and individual rights.²¹⁷ Consequently, this decision may have induced a trend in substantial similarity decisions to construe the boundaries of infringement more liberally, absolving more alleged infringers from liability and impacting the decline in substantial similarity win rates through the mid-1990s.²¹⁸

C. Analysis of Substantial Similarity Opinions by Circuit and Test Applied

Evidenced by the multitude of proposals to reformulate, reconcile, and abolish the substantial similarity tests, there can be no doubt that the substantial similarity doctrine has perplexed students, scholars, and courts for decades.²¹⁹ Still, the Supreme Court has yet to mandate a universal standard to aid the copyright infringement inquiry, and so the inevitable question arises: why not? Perhaps the clearest answer is that, despite their contentious and difficult application, the tests are not mutually exclusive.²²⁰ Even so, if substantial similarity win rates differ drastically among the circuits and according to the test that is applied, the argument for intervention is strengthened, shifting the impetus for change from a desire for clarity to a need for equity. To determine whether and to what extent such an inequity exists, an analysis of the substantial similarity win rates in each circuit was conducted, in addition to a separate examination of the substantial similarity win rates according to the test applied in each of the cases studied.

1. *Distribution of Substantial Similarity Opinions by Circuit and Test Applied*

As shown in Table 1, a majority of the opinions studied were from the Second and Ninth Circuits, collectively accounting for 55.6% of the total

217. See 510 U.S. at 578 n.10.

218. See *supra* Figure 3.

219. See, e.g., 2 ABRAMS, *supra* note 64, § 14:41; JOHN W. HAZARD, JR., COPYRIGHT LAW IN BUSINESS AND PRACTICE § 7:27 (rev. ed. 2011).

220. Alan J. Hartnick, *The Osterbergs' Substantial Similarity in Copyright Law*, 51 J. COPYRIGHT SOC'Y U.S.A. 243, 243 (2003) (book review) (noting that “there is more than one test for copyright infringement and the tests are not mutually exclusive” (quoting Robert Bernstein & Robert W. Clarida, ‘*Ay There’s the Rug*,’ N.Y. L.J., Sept., 19, 2003, at 3)).

sample, and contributing 30.8% and 24.8%, respectively.²²¹ Within those circuits, 26.9% and 15.0% of the total cases in this study originated in the Southern District of New York (S.D.N.Y.) and the Central District of California (C.D. Cal.).²²² The Sixth and Eleventh Circuits each contributed 7.3% of the opinions studied, the Fifth Circuit accounted for 5.6% of the opinions, and each of the seven remaining circuits comprised less than 5% of the 234 opinions.²²³

221. See *infra* Table 1. In his empirical study of fair use opinions, Professor Beebe likewise found that the district and circuit courts of the Second and Ninth Circuits dominated the sample: the Second Circuit courts accounted for 38.6% of the circuit court opinions, and the Ninth Circuit courts were responsible for 28.4% of the circuit court opinions. Beebe, *supra* note 10, at 567.

222. See *infra* Table 1. At the district court level, Professor Beebe also found that the U.S. District Court for the Southern District of New York “alone accounted for 31.3% of the district court opinions, with the Northern District of California next at 7.6%.” Beebe, *supra* note 10, at 567.

223. See *infra* Table 1.

Table 1: Distribution of Opinions by Circuit and District

Circuit	n	%	District	n	%
1	11	4.7%	D. Mass.	8	3.4%
			D. Me.	1	0.4%
			P.R.	1	0.4%
2	73	30.8%	S.D.N.Y.	63	26.9%
			E.D.N.Y.	8	3.4%
			W.D.N.Y.	1	0.4%
			D. Vt.	1	0.4%
3	7	3.0%	D.N.J.	3	1.3%
			E.D. Pa.	2	0.9%
			W.D. Pa.	1	0.4%
			W.D. Penn.	1	0.4%
4	8	3.4%	E.D. Va.	3	1.3%
			M.D.N.C.	2	0.9%
			W.D.N.C.	1	0.4%
			D. Md.	1	0.4%
			W.D. Va.	1	0.4%
5	13	5.6%	S.D. Tex.	5	2.1%
			N.D. Tex.	5	2.1%
			E.D. La.	2	0.9%
			S.D. Fla.	1	0.4%
			S.D. Miss.	1	0.4%
			E.D. Mich.	9	3.8%
6	17	7.3%	M.D. Tenn.	3	1.3%
			S.D. Ohio	2	0.9%
			E.D. Tenn	1	0.4%
			N.D. Ohio	1	0.4%
7	8	3.4%	W.D. Mich.	1	0.4%
			N.D. Ill.	6	2.6%
			N.D. Ind.	1	0.4%
8	9	3.8%	S.D. Ind	1	0.4%
			D. Minn.	6	2.6%
			W.D. Mo.	2	0.9%
9	58	24.8%	W.D. Mo.	1	0.4%
			C.D. Cal.	35	15.0%
10	11	4.7%	N.D. Cal.	8	3.4%
			S.D. Cal.	8	3.4%
			D. Ariz.	2	0.9%
			D. Alaska	1	0.4%
			D. Hawaii	1	0.4%
			D. Idaho	1	0.4%
			D.C. Cal	1	0.4%
			D. Nev.	1	0.4%
			D. Colo.	4	1.7%
			D.N.M.	2	0.9%
D. Utah	2	0.9%			
11	17	7.3%	W.D. Okla.	2	0.9%
			D. Kan.	1	0.4%
			S.D. Fla.	8	3.4%
			M.D. Fla.	4	1.7%
			N.D. Ga.	3	1.3%
D.C.	2	0.9%	N.D. Ala.	1	0.4%
			S.D. Ga.	1	0.4%
			D.D.C.	2	0.9%
Total	234			234	

Consistent with the statuses of the Second and Ninth Circuits as the leading copyright courts, certain subject matters dominated in the circuits.²²⁴ In the Second Circuit, 39.7% of the opinions involved subject matters within the category of graphic, pictorial, and sculptural works, followed closely by 32.8% of opinions involving literary works. Cases from the Ninth Circuit largely involved literary works and computer software, each of which accounted for 48.3% and 17.2% respectively, of the circuit's opinions. Thus, substantial similarity case law has been, and still is, largely influenced by traditional, non-electronic media.²²⁵

To reliably address the various approaches to the substantial similarity tests used among the circuits, a content analysis of the opinions was conducted, and the test applied in each case was categorized. Including two versions for the three substantial similarity tests resulted in six distinct categories: the ordinary observer test, the more discerning ordinary observer test, the extrinsic/intrinsic test, the extrinsic/intrinsic test with the intended audience test, the abstraction-filtration-comparison test, and the abstraction-filtration by the intended audience test.²²⁶ Not surprisingly, because the Second Circuit's approach is the longest standing and most-favored among the circuits,²²⁷ the ordinary observer test represented 54.7% of the 234 opinions. The extrinsic/intrinsic test was applied in 27.8% of the opinions, and the abstraction-filtration-comparison test was used in 7.2% of the opinions. Interestingly, disputes requiring a more discerning or specialized audience comprised only 10.3% of the opinions—with 3.8% applying the more discerning ordinary observer test, 3.4% applying the extrinsic/intrinsic test with the intended audience test, and 3.0% applying the abstraction-filtration by the intended audience test.

2. Substantial Similarity Win Rates by Circuit and Test Applied

Figure 4 displays the percentage of opinions in which substantial similarity was found—and the copyright holder thus prevailed—for each of the circuits. Substantial similarity win rates were the highest in the Seventh Circuit and the Third Circuit, with 62.5% and 57.1% of the opinions favoring the copyright holder, respectively. The remaining circuits contained case law that was skewed in favor of the defendant. The Eleventh Circuit—with 11.8%—and the Fifth Circuit—with 15.4%—had the lowest substantial

224. Beebe, *supra* note 10, at 572 (“Notwithstanding scholarly emphasis on fair use and new media, traditional two-dimensional nonvirtual print media have dominated and continue to dominate the facts of American fair use case law.”). Not surprisingly, the same is true of substantial similarity case law.

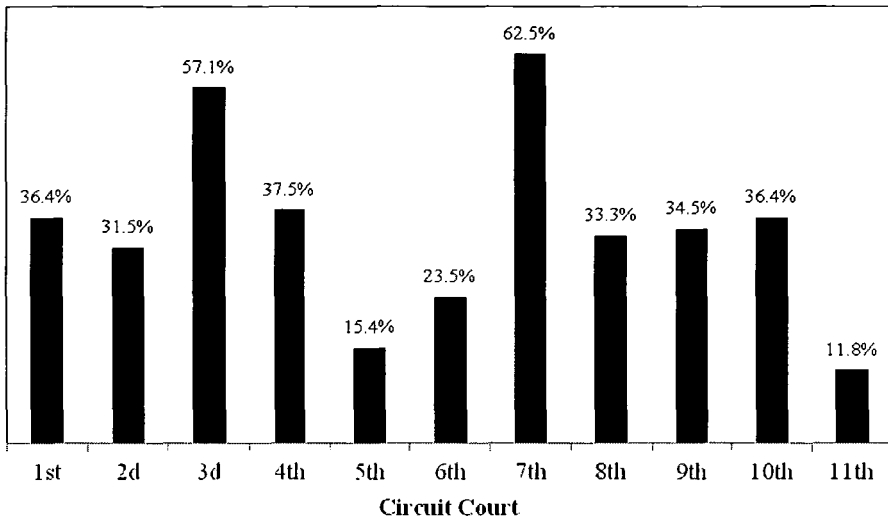
225. *Id.* at 572-73.

226. *See supra* Section II.B.

227. *See supra* Section II.B.

similarity win rates. The substantial similarity win rates were relatively consistent for the First, Second, Fourth, Sixth, Eighth, Ninth, and Tenth Circuits, ranging between 23.5% and 37.5%—all finding for the copyright holder.

Figure 4: Percentage of Opinions Finding Substantial Similarity by Circuit



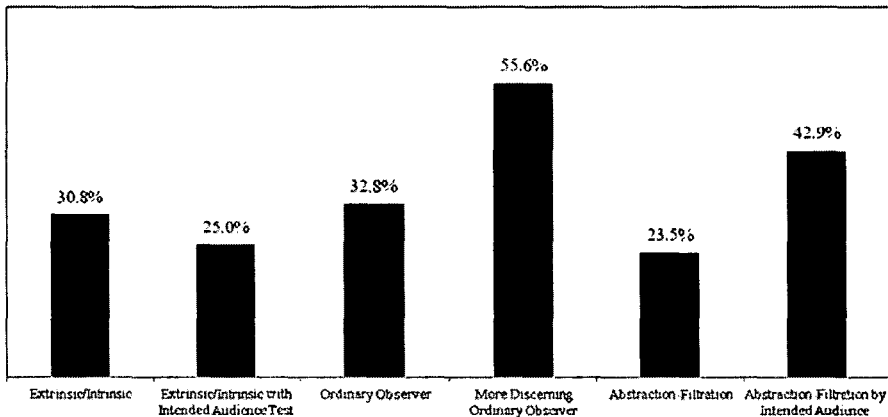
As shown in Figure 5, the opinions applying the more discerning ordinary observer test featured a substantial similarity win rate of 55.6%, the highest of the tests. The lowest substantial similarity win rates, 23.5% and 25.0%, were found in opinions using the abstraction-filtration-comparison test and the extrinsic/intrinsic test with the intended audience test, respectively.²²⁸ Remarkably, however, when collapsing the six substantial similarity tests into the three main tests—the ordinary observer test, the extrinsic/intrinsic test, and the abstraction-filtration-comparison test—their substantial similarity win rates become closely aligned.²²⁹ Hence, the percent-

228. Further research is required to determine if these win rate percentages would be different if the sample size was larger. There were fewer opinions that utilized the specialized versions of the substantial similarity tests. For instance, of the 234 opinions, 9 opinions applied the more discerning ordinary observer test, 8 opinions applied the extrinsic/intrinsic test with intended audience test, and 7 opinions applied the abstraction-filtration by the intended audience test. By comparison, 128 opinions applied the ordinary observer test, 65 applied the extrinsic/intrinsic test, and 17 applied the abstraction-filtration-comparison test.

229. Rather than considering each of the six tests in isolation, the opinions were then distributed into three groups based on which of the three main “root” tests was applied. Thus, the opinions applying the ordinary observer test and the more discerning ordinary observer test were combined ($n = 137$); the opinions applying the extrinsic/intrinsic test and extrinsic/intrinsic test with intended audience test were combined ($n = 73$); and the opinions apply-

age of opinions finding substantial similarity is 32.8% for the ordinary observer test, 25.0% for the extrinsic/intrinsic test, and 23.5% for the abstraction-filtration-comparison test. Certainly, such a finding shows that substantial similarity cases overwhelmingly tend to fall in favor of the alleged infringers, but it reveals something more. If one pays no heed to additional variables,²³⁰ the probability that the copyright holder will prevail remains the same, regardless of which test is applied. This conclusion plausibly weakens the argument that one of the tests should be abolished in favor of the other or that one is more disadvantageous to either party. Consequently, at least in terms of overall substantial similarity win rates, if there is an inequity underlying the case law, it should not be attributed to the tests alone.

Figure 5: Percentage of Opinions Finding Substantial Similarity by Test Applied



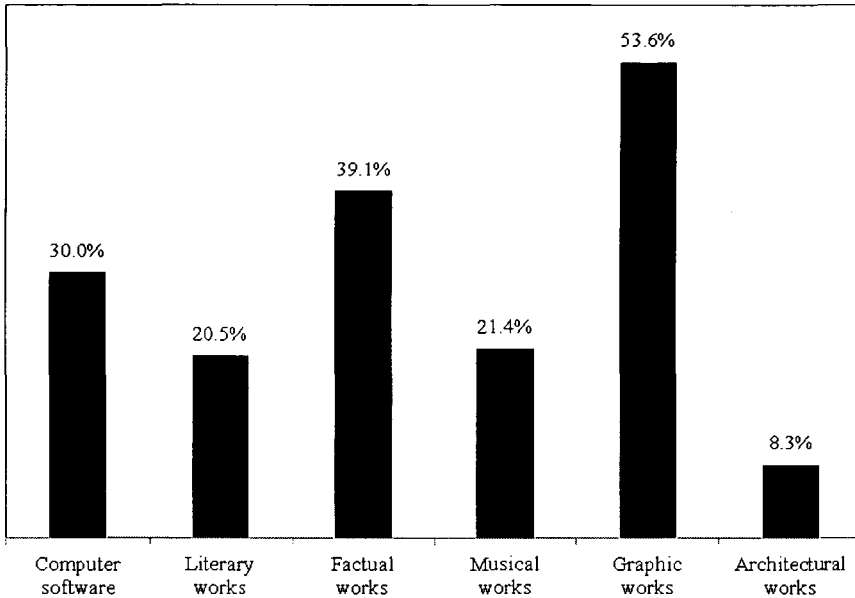
D. Analysis of Substantial Similarity Opinions by Subject Matter

The opinions were divided into six different categories of subject matter: literary works; pictorial, graphic, and sculptural works; musical works; computer software; factual works; and architectural works.

ing the abstraction-filtration-comparison test and abstraction-filtration by the intended audience test were combined ($n = 24$). See *supra* Section II.B.

230. Additional variables would include the subject matter of copyrightable work at issue, the posture of the case, and the circuit court hearing the appeal, among others. Such variables undoubtedly have an effect on the ultimate outcome of the case, but this study argues that if the opinions are distributed into three groups based solely on the substantial similarity test applied by the court—(1) the ordinary observer test (and more discerning ordinary observer test); (2) the extrinsic/intrinsic (and extrinsic/intrinsic test with intended audience test); or (3) the abstraction-filtration-comparison test (and abstraction-filtration by the intended audience test)—the likelihood that the copyright holder will prevail remains unchanged, regardless of which test is used. See *supra* Section II.B.

Figure 6: Percentage of Opinions Finding Substantial Similarity by Subject Matter



1. *Literary Works: Distribution and Substantial Similarity Win Rate*

Comprising 31.2% of the opinions studied, literary works were the largest subject matter category. However, the substantial similarity win rate for literary works when the plaintiff prevailed was only 20.5%. To simplify the substantial similarity analysis, courts boil down the difference between fictional literary and dramatic works as stories with different manners of expression: literary fiction is expressed with words on paper, while dramatic fiction is expressed with action on a screen.²³¹ Thus, regardless of the medium, courts apply the same substantial similarity analysis to all stories, first plucking out their constituent elements—“plot/sequence of events, dialogue, characters, theme, mood, setting, and pace”—and scrutinizing each to determine the extent of similarities between the two works, then parsing them back together to compare their overall impressions.²³² However, distinguish-

231. U.S. COPYRIGHT OFFICE, COMPENDIUM II OF COPYRIGHT OFFICE PRACTICES § 431 (1984).

232. OSTERBERG & OSTERBERG, *supra* note 3, § 4. “To determine whether two fictional literary or dramatic works are substantially similar, courts generally analyze seven concrete elements, and they also evaluate the overall impression created by the works at issue.” *Id.* The concrete elements are “plot/sequence of events, dialogue, characters, theme, mood, setting, and pace.” *Id.* “No one element will control the overall impression, but plot/sequence of events, dialogue and characters seem often to be the most influential.” *Id.*

ing between unprotectable literary ideas and an author's protectable expression is infamously difficult.²³³

The use of similar scènes à faire, historical facts, generic parallels, random words, trite comments, writing styles, and structures cannot justify a finding of substantial similarity.²³⁴ For instance, scènes à faire, the indispensable scenes that "'must' be done"²³⁵ to convey a topic are too "common-place"²³⁶ to be protectable.²³⁷ Thus, creativity aside, copyright law does not protect the inclusion of drunks, vermin, and derelict cars, for example, in a realistic work about policemen working in the South Bronx of New York;²³⁸ "parties, alcohol, co-eds and wild behavior . . . in a story about a college fraternity";²³⁹ escapes, flights through the woods with pursuit by barking dogs, singing slaves, and the atrocity of buying and selling people in a story about slavery;²⁴⁰ "electrified fences, automated tours, dinosaur nurseries, and uniformed workers" in a story about a dinosaur zoo;²⁴¹ or "security cameras, violence, a police man [sic] doing his duty, and the countdown of time" in a story about a robbery.²⁴²

Likewise, since courts agree that there are a finite number of dramatic situations that form the basis of all human drama, similarity between the plot and sequence of two works is not an infringement.²⁴³ Consequently, any story about forbidden love that leads to the tragic death of one of the lovers is viewed as little more than a retelling of Shakespeare's *Romeo and Juliet* play.²⁴⁴ The same can be said of stories about egotistical men trapped in a repeated day who transform into a caring person, "white individuals who overcome racism through relationships with a black helper[, or] aliens who come to Earth."²⁴⁵

233. "The test is necessarily vague and nothing more definite can be said about it." § 4:1 n.15.

234. *Id.*

235. *Schwarz v. Universal Pictures Co.*, 85 F. Supp. 270, 275 (S.D. Cal. 1945).

236. *Swirsky v. Carey*, 376 F.3d 841, 850 (9th Cir. 2004).

237. OSTERBERG & OSTERBERG, *supra* note 3, § 2:3.3. The concept has been extended to music, architecture, and beyond. *See generally id.*

238. *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986).

239. *Stromback v. New Line Cinema*, 384 F.3d 283, 296 (6th Cir. 2004).

240. *Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978).

241. *Williams v. Crichton*, 84 F.3d 581, 589 (2d Cir. 1996).

242. *Robinson v. New Line Cinema Corp.*, 42 F. Supp. 2d 578, 592 (D. Md. 1999).

243. *Desny v. Wilder*, 46 Cal. 2d 715, 741 (1946) ("There are only thirty-six fundamental dramatic situations, various facets of which form the basis of all human drama.' It is manifest that authors must work with and from ideas or themes which basically are in the public domain." (citation omitted)).

244. *See id.*

245. OSTERBERG & OSTERBERG, *supra* note 3, § 4 (footnote omitted) ("Many infringement claims have failed because similarities in the general pattern or skeleton of the plot were not accompanied by protected details of expression.").

2. Pictorial, Graphic, and Sculptural Works: Distribution and Substantial Similarity Win Rate

Opinions involving pictorial, graphic, and sculptural works, otherwise considered “works of visual art,”²⁴⁶ comprised 29.9% of the opinions studied. The considerable size of this broadly defined category might be a reflection of the diverse subject matters within it: illustrations and paintings; fabric, carpet, and wall covering designs; stuffed animals; dolls, sculptural objects, and figurines; clothing; games; and maps. Unlike dramatic fiction and literary fiction, which courts indiscriminately group together and analyze in the same way, each subcategory of visual work is analyzed in a slightly different way.²⁴⁷ This tailored approach may explain the significantly higher substantial similarity win rate in this category of 52.9%. In fact, not only do opinions involving visual works have the highest win rate, they are also the only subject matter category that is more likely to favor the copyright holder than the alleged infringer.

3. Musical Works: Distribution and Substantial Similarity Win Rate

Opinions that addressed facts involving music comprised 12.8% of the opinions studied and included both the oldest case in the sample and one of the most influential. In 1923, *Marks v. Leo Feist, Inc.*²⁴⁸ formulated the “substantiality test.”²⁴⁹ In 1946, *Arnstein v. Porter* articulated the “ordinary observer test,”²⁵⁰ an approach that the Second Circuit still adheres to for musical works and all other subject matters, with few exceptions.²⁵¹ The substantial similarity win rate for disputes involving musical works was 21.4%, only slightly higher than that of literary works.²⁵²

Music also consists of two distinct protectable parts: the music and lyrics written by the composer and the sound recording of the written music being performed by the musicians.²⁵³ Interestingly, the two parts are gov-

246. *Id.* § 10.

247. *Id.*

248. 290 F. 959 (2d Cir. 1923).

249. Raphael Metzger, *Name that Tune: A Proposal for an Intrinsic Test of Musical Plagiarism*, 5 LOY. L.A. ENT. L. REV. 61, 71 n.55 (1985), available at <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1067&context=elr> (“[T]he substantiality test prohibits all substantial copying, whereas the audience test forbids only substantial copying which is aurally perceptible to the average person.”).

250. 154 F.2d 464, 468 (2d Cir. 1946); see Metzger, *supra* note 249, at 78-83.

251. OSTERBERG & OSTERBERG, *supra* note 3, § 3 n.1 (“[T]he Second Circuit in *Arnstein* required that plaintiffs prove both (1) copying and (2) illicit copying (unlawful appropriation) to establish infringement. The Second Circuit still adheres to that approach.”).

252. See *supra* Figure 6.

253. OSTERBERG & OSTERBERG, *supra* note 3, §§ 3.1.1[B], 3:2.1[B].

erned under different sections of the Copyright Act.²⁵⁴ Hence, the sound recording is protected only from actual reproduction of the recording, while the music and lyrics are subject to the substantial similarity analysis. Infringement can be found on the basis of the music, the lyrics, or both.²⁵⁵ Courts treat lyrics as literary works, similar to poems, but they regard music as “complex expression”²⁵⁶ and “often rely [] on expert testimony to assist in the determination of substantial similarity.”²⁵⁷

4. Computer Programs: Distribution and Substantial Similarity Win Rate

The percentage of opinions addressing facts involving computer software was 12.4%, relatively equal to the proportion of opinions involving musical works. However, the first substantial similarity case involving computer software in our sample did not appear until 1982, nearly sixty years after the first cases addressing songs.²⁵⁸ Consequently, from 1982 to 2011, opinions involving computer software became more frequent than opinions involving music, with computer software cases contributing 15.4% and music cases contributing 11.8% of the total opinions. Opinions involving computer software had a 30.0% substantial similarity win rate, with the copyright holder prevailing.²⁵⁹

Computer programs are thought to comprise both a literary work, which includes the program’s code, and an audiovisual work, which is the “graphical user interface” that consists of the pictures and sounds generated by the program to the user.²⁶⁰ To establish substantial similarity, either the computer program’s code or its user interface must be copied,²⁶¹ but computer programs are also protected as compilations.²⁶² Since 1992, when the

254. *Id.* The copyright in the music is governed by § 106 of the Copyright Act. 17 U.S.C. § 106 (2011). The copyright in the sound recording is governed by § 114 of the Copyright Act and is limited to the actual reproduction of the recorded sounds. *Id.* § 114.

255. OSTERBERG & OSTERBERG, *supra* note 3, § 9.

256. *See, e.g., Swirsky v. Carey*, 376 F.3d 841, 849 (9th Cir. 2004).

257. OSTERBERG & OSTERBERG, *supra* note 3, § 9:1.

258. *See Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 610 (7th Cir. 1982).

259. *See supra* Figure 6.

260. OSTERBERG & OSTERBERG, *supra* note 3, § 8:1 (“One may think of a computer program as a combination of two works: a literary work consisting of the program’s code, and an audiovisual work consisting of the pictures and sounds the program generates to the user.”).

261. *Id.* (“One infringes the copyright in a computer program when one copies protected elements of either the literary or the audiovisual component.”).

262. *Id.* § 8:4. A compilation is the “selection, coordination, and arrangement of information.” *Id.* Hence, in regards to computer programs, “[t]he arrangement of unprotectable code modules or commands may be protected as a compilation,” for example. *Id.*

Second Circuit articulated the proper test for infringement of a computer program in *Computer Associates International, Inc. v. Altai, Inc.*,²⁶³ courts have applied the abstraction-filtration-comparison test by abstracting a list of the elements the defendant copies, filtering out unprotectable elements, and comparing the elements that are left to determine if the programs are substantially similar.²⁶⁴

5. *Factual Works: Distribution and Substantial Similarity Win Rate*

Opinions addressing facts involving nonfiction or factual works, which have the narrowest copyright protection of all subject categories, constituted 9.4% of the opinions studied.²⁶⁵ Factual works, which include textbooks, educational materials, docudramas, television game shows, reality television, and other unscripted programs,²⁶⁶ had a relatively high substantial similarity win rate of 39.1%, where the plaintiff prevailed.²⁶⁷ This result could be explained by the ease with which courts can discern the infringement of a factual work. Indeed, “to support a finding of substantial similarity” between two factual works, “a higher quantity of copying is required,”²⁶⁸ which often “amount[s] to verbatim reproduction or very close paraphrasing.”²⁶⁹ Copyright protection is thus narrow, “embracing no more than the author’s original expression of particular facts and theories already in the public domain.”²⁷⁰

263. 982 F.2d 693, 706 (2d Cir. 1992).

264. See, e.g., *Gen. Universal Sys., Inc. v. Lopez*, 379 F.3d 131, 142-43 (5th Cir. 2004); *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1543-44 (11th Cir. 1996); *Eng’g Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1342-43 (5th Cir. 1994); *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 834 (10th Cir. 1993); see also *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 614 (7th Cir. 1982) (conducting abstraction-filtration-comparison without naming it such); *Cybermedia, Inc. v. Symantec Corp.*, 19 F. Supp. 2d 1070, 1077 (N.D. Cal. 1998); *Control Data Sys., Inc. v. Infoware, Inc.*, 903 F. Supp. 1316, 1322 (D. Minn. 1995).

265. OSTERBERG & OSTERBERG, *supra* note 3, § 6:1. To avoid inhibiting the use of factual materials, courts have emphasized that the copyright in nonfiction is “narrow indeed, embracing no more than the author’s original expression of particular facts and theories already in the public domain.” *Id.* (quoting *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 974 (2d Cir. 1980)).

266. *Id.*

267. See *supra* Figure 6.

268. *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 71 (2d Cir. 1999).

269. *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 488 (9th Cir. 1984); see also *Hoehling*, 618 F.2d at 974.

270. *Hoehling*, 618 F.2d at 974; accord *Chase-Riboud v. Dreamworks, Inc.*, 987 F. Supp. 1222, 1226 (C.D. Cal. 1997) (quoting *Hoehling*, 618 F.2d at 974).

6. *Architectural Works: Distribution and Substantial Similarity Win Rate*

Finally, opinions involving architectural works comprised only 5.1% of the opinions. Like computer software cases,²⁷¹ disputes over architecture are a more recent phenomenon, with the first of such cases appearing in 1984.²⁷² This emergence is likely because, prior to the Architectural Works Copyright Protection Act of 1990, only the architectural plans for buildings, not the buildings themselves, could receive copyright protection.²⁷³ Even now, although both architectural plans and constructions are protected, buildings constructed before December 1, 1990 are not protectable.²⁷⁴ Architectural works had a win rate of only 8.3%, the lowest in the sample,²⁷⁵ likely due to the narrow range of protection such works are afforded.

Copyright protection for architectural works “includes the overall form . . . [and] the arrangement and composition of spaces and elements in the [architectural] design, but does not include individual standard features.”²⁷⁶ Thus, an ordinary observer’s overall impression of the works is the key inquiry for determining substantial similarity.²⁷⁷ Still, courts evaluating architectural works admit to emphasizing dissimilarities more so than when analyzing other copyright claims, explaining that “there are only a finite number of ways a rectangle can be divided into bedrooms, baths, kitchen, living room, closets and so on.”²⁷⁸ Likewise, functional elements, such as the traffic flow route and methods of construction and engineering are unprotectable.²⁷⁹ Similarities that result from budgetary or regulatory constraints, adherence to particular style, conformity to existing buildings, and the inclusion of features that are common to urban high-rises are also not considered when evaluating substantial similarity, leaving a limited scope of

271. See *supra* note 190 and accompanying text.

272. Wickham v. Knoxville Int’l Energy Exposition, Inc., 739 F.2d 1094 (6th Cir. 1984).

273. OSTERBERG & OSTERBERG, *supra* note 3, § 11:3.

274. *Id.*

275. See *supra* Figure 6.

276. 17 U.S.C. § 101 (2006); see also Greenberg v. Town of Falmouth, No. Civ.A. 04-11934-GAO, 2006 WL 297225, at *3 (D. Mass. Feb. 8, 2006) (citing 17 U.S.C. § 101 (2006)).

277. See Greenberg, 2006 WL 297225, at *4; Su, *supra* note 87, at 1853.

278. Home Design Servs., Inc. v. David Weekley Homes, L.L.C., 548 F. Supp. 2d 1306, 1313 (M.D. Fla. 2008).

279. OSTERBERG & OSTERBERG, *supra* note 3, § 11 (quoting *Attia v Soc’y of N.Y. Hosp.*, 201 F.3d 50, 55 (2d Cir 1999)).

expression that depends largely on the effect created by certain design elements.²⁸⁰

E. Analysis of Substantial Similarity Opinions by Posture and Rates of Reversal and Affirmance

The oft-stated rule is that “summary judgment is not highly favored on the substantial similarity issue in copyright cases”²⁸¹ because an “extremely close issue of fact”²⁸² is usually involved. However, the data reveals something different: grants of summary judgment are the overwhelmingly favored means to jettison the issue of substantial similarity, “especially where defendants are [the] moving parties.”²⁸³ Such a practice influences the result of the substantial similarity determination at the district level and on appeal.²⁸⁴

280. *Id.* § 11:1 (“The ‘effect’ created by certain design elements can be a significant factor in the substantial similarity analysis with respect to architectural works, even if the designs themselves are distinguishable.”).

281. *Berkic v. Crichton*, 761 F.2d 1289, 1292 (9th Cir. 1985) (“[A]s a general rule, summary judgment is not highly favored on the substantial similarity issue in copyright cases.”).

282. *Litchfield v. Spielberg*, 736 F.2d 1352, 1355 (9th Cir. 1984) (“Substantial similarity is usually an extremely close issue of fact and summary judgment has been disfavored in cases involving intellectual property.”).

283. Julie J. Bisceglia, *Summary Judgment on Substantial Similarity in Copyright Actions*, 16 HASTINGS COMM. & ENT. L.J. 51, 75 (1993) (“On the contrary, summary judgment is overwhelmingly favored on this issue, at least in the reported decisions, and especially where defendants are moving parties.”).

The large percentage of cases granting summary judgments to defendants reveals a distinct factual pattern: an unknown author sues a studio, a famous writer, or a famous star (or all three) for “copying” his work in a well-known movie, television show, or book claiming, “I wrote . . .” The dismissal of these suits accounts not only for the vast majority of the summary judgment motions granted to defendants but also for the vast majority of summary judgment motions granted to any party on the issue of substantial similarity.

Id. (footnote omitted). *But see* OSTERBERG & OSTERBERG, *supra* note 3, § 3:1.1[D] (noting that courts should be wary of granting summary judgment in copyright cases because of their highly fact specific nature); Dalton & Cable, *supra* note 48, at 26 (“In copyright infringement cases, granting summary judgment, particularly in favor of a defendant, is a practice to be used sparingly . . .”) (quoting *Kohus v. Mariol*, 328 F.3d 848, 853 (6th Cir. 2003)). “Summary judgment on substantial similarity is ‘unusual’” in that “[s]ubstantial similarity is customarily an extremely close question of fact . . .” and thus ‘summary judgment has traditionally been frowned upon in copyright litigation.’” *Id.* (quoting *T-Peg, Inc. v. Vt. Timber Works, Inc.*, 459 F.3d 97, 112 (1st Cir. 2006); *Hochling v. Universal City Studios, Inc.*, 618 F.2d 972, 977 (2d Cir. 1980)). The general rule is that plagiarism suits, given the “‘fact-based nature of’ the substantial similarity ‘inquiry,’” should proceed to trial. *Id.* (quoting *Alexrod & Cherveney Architects, P.C. v. Winmar Homes*, No. 2:05-cv-711, 2007 WL 708798, at *8 (E.D.N.Y. Mar. 6, 2007)).

284. *See, e.g., supra* notes 268-70, 281-82.

1. Distribution of Substantial Similarity Opinions by Posture on Appeal

Figure 7 shows the procedural postures—across time—of district court opinions on appeal to the circuit courts. A moving average of the most frequent postures—bench trial verdict, grant of summary judgment, and issuance of a preliminary injunction—of the appealed district court opinions from 1970 to 2010 reveals an increasing trend in the number of substantial similarity cases decided on a motion for summary judgment. In fact, in the total sample of 234 opinions, ranging from 1923 to 2010, 128 opinions had resolved the issue of substantial similarity by summary judgment at the district court level.

Figure 7: Three-Period Moving Averages of the Dispositions District Court Opinions Appealed to the Circuit Courts

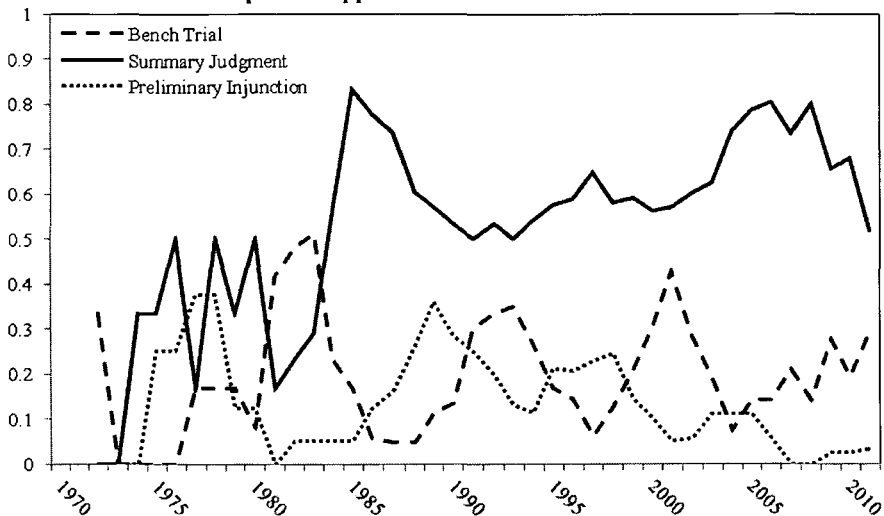


Figure 7 also depicts a steep increase in the number of summary judgment opinions in the mid-1980s, which coincides with a decrease in number of bench trials.²⁸⁵ The mid-1980s bump could likely be the result of several prominent appellate court opinions, each of which affirmed the lower court's grant of summary judgment in favor of the defendant: *Litchfield v. Spielberg*,²⁸⁶ referenced in 254 other cases;²⁸⁷ *Berkic v. Crichton*,²⁸⁸ refer-

285. See also Beebe, *supra* note 10, at 571-72 & fig.3 (finding a substantial drop-off in the proportion per year of bench trial opinions in 1994 and a fairly dramatic increase, beginning in the early to mid-1990s, in the proportion of opinions which engaged in summary adjudication of the fair use defense).

286. 736 F.2d at 1354.

287. These numbers were found using Westlaw on April 23, 2013. *Id.*

enced in 105 other cases;²⁸⁹ and *Walker v. Time Life Films, Inc.*,²⁹⁰ referenced in 376 other cases.²⁹¹ Indeed, in these opinions and those that follow them, the courts recognize that “granting summary judgment, particularly in favor of a defendant, is a practice to be used sparingly in copyright infringement cases,”²⁹² but nevertheless state that “a court may compare the two works and render a judgment for the defendant on the ground that as a matter of law a trier of fact would not be permitted to find substantial similarity.”²⁹³ Indeed, another survey of sixty cases published over the past four years reveals that pretrial dismissals of copyright claims on the basis of substantial similarity are hardly a long shot.²⁹⁴

2. Substantial Similarity Win Rates by Posture on Appeal

Table 2 displays the distribution of opinions according to the holding of the district court and the fate of those decisions on appeal to the circuit courts. At the district level, the court ruled in favor of the plaintiff—finding substantial similarity—in 23.9% of the 234 cases, while ruling for the defendant—finding no substantial similarity—in 76.1% of cases. Of the 56 cases where the lower court favored the plaintiff, finding substantial similarity, the court of appeals also ruled for the plaintiff in 73.2% of the cases; but, in 26.8% of the cases, the circuit court disagreed with the lower court’s finding of substantial similarity, ruling instead for the defendant. Conversely, of the 178 cases where the lower court favored the defendant, not finding substantial similarity, the court of appeals also ruled for the defendant in 80.3% of the cases while the court of appeals ruled for the plaintiff following a defendant-favorable holding at the district court level in only 19.7% of cases. Taken together, this data indicates defendants are much more likely than plaintiffs to win at the district level, and defendant-favorable holdings are also more likely than plaintiff-favorable holdings to be upheld on appeal.

288. 761 F.2d 1289, 1290-91 (9th Cir. 1985).

289. These numbers were found using Westlaw on April 23, 2013. *Id.*

290. 784 F.2d 44, 46 (2d Cir. 1986).

291. These numbers were found using Westlaw on April 23, 2013. *Id.*

292. *Wickham v. Knoxville Int’l Energy Exposition, Inc.*, 739 F.2d 1094, 1097 (6th Cir. 1984); *see also* *Arnstein v. Porter*, 154 F.2d 464, 470-73 (2d Cir. 1946).

293. *Wickham*, 739 F.2d at 1097; *see also* *Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 918 (2d Cir.1980).

294. *Dalton & Cable*, *supra* note 48, at 26 (“With such dire indications, pretrial dismissal of a copyright claim on the basis of substantial similarity might seem a long shot. Yet, a survey of over 60 published federal cases from the past four years reveals this is not true.”). “This article distills insights from those cases to chart a relatively straightforward, practical approach that a copyright defendant in any circuit can take to increase the chance of defeating substantial similarity on summary judgment.” *Id.*

Table 2A: Distribution of Opinions by Posture on Appeal

POSTURE ON APPEAL			APPELLATE RULING	
Found Substantial Similarity (Plaintiff Win)	<i>n</i>	%	No SS (Reversed)	Found SS (Affirmed)
Bench Trial	20	8.5%	20.0%	80.0%
Jury Trial	11	4.7%	18.2%	81.8%
Summary Judgment	8	3.4%	62.5%	37.5%
Preliminary Injunction	17	7.3%	23.5%	76.5%
Total-Plaintiff	56	23.9%	26.8%	73.2%

Table 2B: Distribution of Opinions by Posture on Appeal

POSTURE ON APPEAL			APPELLATE RULING	
Found Substantial Similarity (Plaintiff Win)	<i>n</i>	%	No SS (Reversed)	Found SS (Affirmed)
Bench Trial	20	8.5%	20.0%	80.0%
Jury Trial	11	4.7%	18.2%	81.8%
Summary Judgment	8	3.4%	62.5%	37.5%
Preliminary Injunction	17	7.3%	23.5%	76.5%
Total-Plaintiff	56	23.9%	26.8%	73.2%

Though the reason for this imbalance is unknown, it could be explained by the posture of the cases on appeal. For instance, before reaching the court of appeals, 55.3%²⁹⁵ of the plaintiff-favorable district court decisions were adjudicated via bench trial or jury trial while only 14.0%²⁹⁶ of the defendant-favorable district court decisions were adjudicated via bench or jury trial. Moreover, of the entire sample of 234 opinions, only 3.4% of the plaintiff-favorable district court decisions were resolved at the summary judgment stage; yet, district courts granted a defendant's motion for summary judgment in 51.3% of the cases. Simply put, on the issue of substantial similarity at the district level, more than half of plaintiff-favorable decisions

295. The number of plaintiff-favorable bench trial opinions ($n = 20$) and jury trial opinions ($n = 11$) were added together and then divided by the total number of plaintiff-favorable district court opinions ($n = 56$).

296. The number of defendant-favorable bench trial opinions ($n = 22$) and jury trial opinions ($n = 3$) were added together and then divided by the total number of defendant-favorable district court opinions ($n = 178$).

are decided by trial and just over half of defendant-favorable decisions are made at the summary judgment stage.

An environment where summary judgment is frequently granted in favor of defendants on the substantial similarity issue poses a significant challenge to plaintiffs.²⁹⁷ As shown by Figure 9, periods of declining substantial similarity win rates are roughly met with respective increases in the percentage of summary judgment opinions over time. Thus, an increase in summary adjudications coincides with a decline in the frequency of trials, but it also corresponds to a decrease in substantial similarity win rates. This result raises the possibility that summary judgment on the substantial similarity issue may actually decrease the likelihood that a copyright holder will prevail due to the fact that the proper test for substantial similarity—which “requires the response of the ordinary lay observer,” not the judge—is not applied.²⁹⁸ The substantial similarity issue, it would seem, is an “archetypal jury question, for which summary judgment would never be appropriate.”²⁹⁹

Consequently, one could deduce that a defendant-favorable district court decision finding that the works are not substantially similar is less likely to be overturned on appeal because, in most cases, that decision was made at the summary judgment stage;³⁰⁰ and, presumably, the case is weak or frivolous.³⁰¹

297. See Bisceglia, *supra* note 283, at 75; see also Morton Denlow, *Summary Judgment: Boon or Burden?*, JUDGES' J., Summer 1998, at 26-27 (“Although a plaintiff has equal recourse to summary judgment under Rule 56, the motion has largely become a defendant’s weapon.”)

298. Bisceglia, *supra* note 283, at 55-56 (arguing that “[s]ummary judgment based on the issue of substantial similarity creates tension between legal theory and practice,” and that the high percentage of successful defendant motions for summary judgment may reflect the inadequacy of the existing substantial similarity tests).

299. *Id.* at 55.

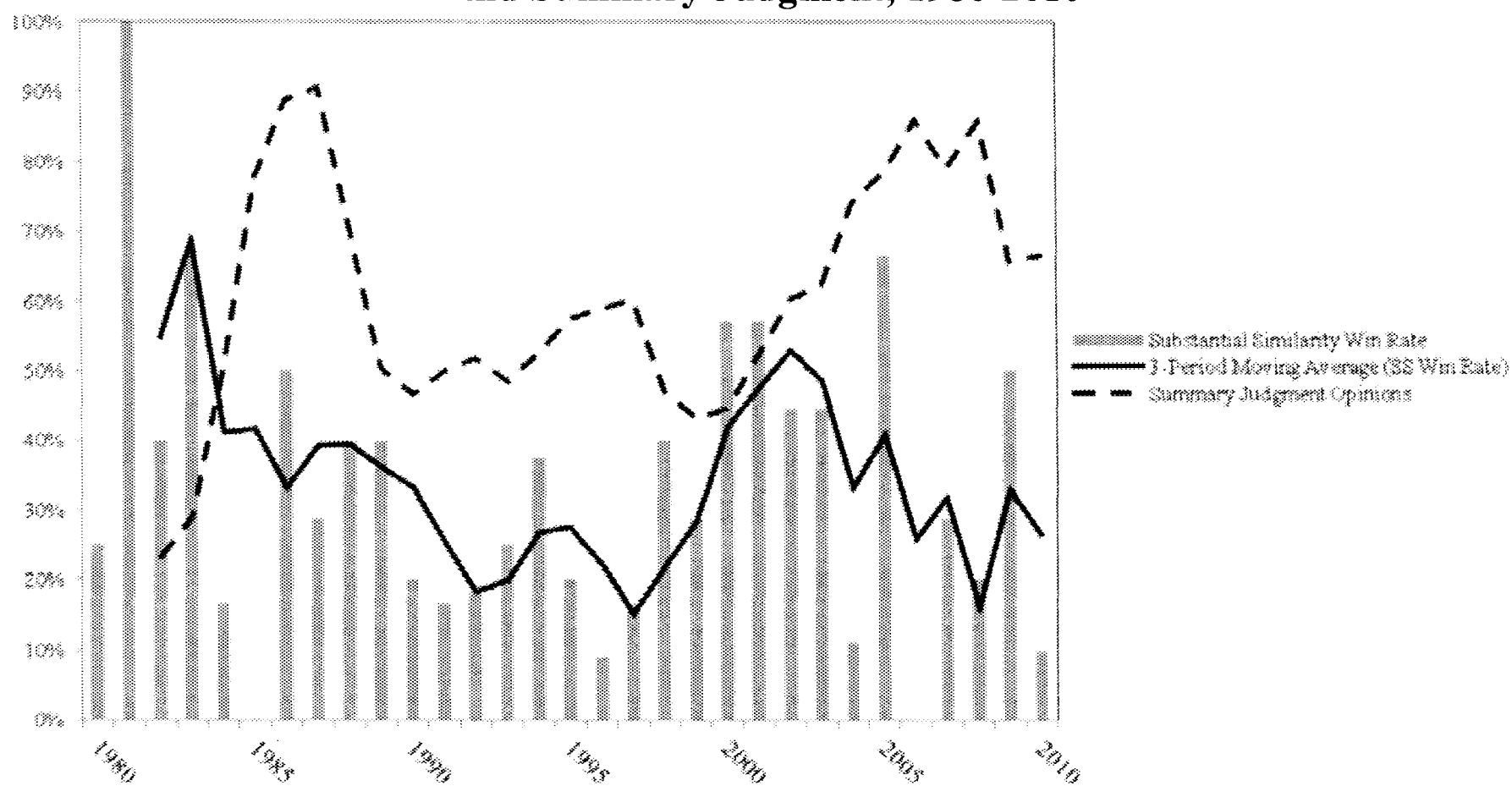
300. Rule 56 of the Federal Rules of Civil Procedure reads:

A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

FED. R. CIV. P. 56(a). See generally Maxwell H. Herriott, *Summary Judgment Practice*, in 5 AM. JUR. TRIALS 105 (1966).

301. See Bisceglia, *supra* note 283, at 64, 75 (finding that “[o]f the cases reviewed, victories for moving defendants constitute more than all other victories combined”).

Figure 9: Substantial Similarity Win Rate and Summary Judgment, 1980-2010



3. Reversal and Affirmance Rates

Much ink has been spilled on the accuracy and implications of reversal and affirmance rates in circuit courts.³⁰² Curiously, however, no comprehensive research concerning the circuit courts' reversals and affirmances of copyright decisions involving the issue of substantial similarity could be found. Although recent estimates of overall circuit court reversals and affirmances were available, estimates from different sources widely varied.³⁰³ For instance, one study estimates an overall circuit courts reversal rate of

302. See, e.g., Joseph L. Smith, *Patterns and Consequences of Judicial Reversals: Theoretical Considerations and Data from a District Court*, 27 JUST. SYS. J. 28, 30-31 (2006); Paul M. Schoenhard, *Reversing the Reversal Rate: Using Real Property Principles to Guide Federal Circuit Patent Jurisprudence*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 299, 302 (2007); Henry J. Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 YALE L.J. 218, 219-29 (1961); Frank B. Cross, *Comparative Judicial Databases*, 83 JUDICATURE 248, 248-49 (2000).

303. The U.S. courts of appeals overturned more than 26% of judgments in civil matters. Corey Rayburn Yung, *Judged by the Company You Keep: An Empirical Study of the Ideologies of Judges on the United States Courts of Appeals*, 51 B.C. L. REV. 1133, 1158-59 (2010); see also Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 135 n.42 (2005). Oldfather cites the 1960 Annual Report by the Director of the Administrative Office of the U.S. Courts, which found a 24.5% reversal rate in the federal courts of appeals among cases terminated on the merits. *Id.* (citing ANNUAL REPORT OF DIRECTOR OF THE ADMINISTRATIVE OFFICE OF U.S. COURTS 210 tbl.B1 (1960)). By contrast, the same office reported a 9.4% reversal rate in 2003. *Id.* (citing OFFICE OF JUDGES PROGRAMS, ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 27 tbl.B-5 (2003), available at <http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2003/tables/B05Mar03.pdf>).

32% from 1980 to 2002.³⁰⁴ Still, another article remarks that, according to the Annual Reports of the Director of the Administrative Office of the U.S. Courts, the proportion of appeals that the circuit courts have reversed has declined precipitously over the years, from 24.5% in 1960 to 9.4% in 2003.³⁰⁵ This decline corroborates with 2010 data, which indicates a reversal rate of 8.4% across all circuits.³⁰⁶ Comparatively, of the 234 majority circuit courts opinions in this study, 47 reversed, remanded, and/or vacated the district court holding, for an overall reversal rate of 25.1%. Of the reversals, 31.9% of the circuit courts opinions reversed a district court finding of substantial similarity, holding instead for the defendant while 68.1% of the reversals resulted in a finding of substantial similarity. In contrast, the circuit courts affirmed 187 district court decisions, for an affirmance rate of 77.0%. Of the affirmances, 76.5% upheld a defendant-favorable decision, finding that the contested works were not substantially similar, whereas 23.5% of the affirmances upheld a plaintiff-favorable decision. Accordingly, reversals more often favor the copyright holder, while most affirmances favor the alleged copier. The reversal rate evidenced by this study supports the notion that appellate courts often affirm lower court holdings, and the results are not significantly different from a similar study of fair use opinions, which found a reversal rate of 33.8%.³⁰⁷

According to some scholars, reversal rates are implicit measurements of the quality of lower court performances.³⁰⁸ In this way, reversal rates are used to justify the negative inference that the district court was wrong.³⁰⁹ Indeed, studies of judicial behavior reveal that judges dislike having their decisions reversed and may avoid it in an effort to advance his or her ca-

304. Beebe, *supra* note 10, at 574 (citing Kevin M. Scott, *Understanding Judicial Hierarchy: Reversals and the Behavior of Intermediate Appellate Judges*, 40 LAW & SOC'Y REV. 163, 177 tbl.1 (2006)).

305. Oldfather, *supra* note 303, at 135 n.42. 1960 is generally regarded as the year in which the dramatic changes in the business of the lower federal courts began. See Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 25 n.72 (1996).

306. OFFICE OF JUDGES PROGRAMS, ADMIN. OFFICE OF U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY 13-16 (2010), available at <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2010/dec10/B05Dec10.pdf> (indicating the following reversal rates statistics in each circuit for 2010: D.C. Circuit, 16.5%; First Circuit, 8.8%; Second Circuit, 6.6%; Third Circuit, 8.4%; Fourth Circuit, 5.6%; Fifth Circuit, 7.8%; Sixth Circuit, 10.0%; Seventh Circuit, 17.1%; Eighth Circuit, 4.7%; Ninth Circuit, 9.6%; Tenth Circuit, 5.7%; and Eleventh Circuit, 8.2%).

307. See Beebe, *supra* note 10, at 574.

308. Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity & Judicial Training on Appeals*, J.L. & ECON. (forthcoming) (George Mason Univ. Law & Econ. Research Paper Series, Paper No. 09-07, 2009) (manuscript at 14-15), available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=1319888##.

309. *Id.* at 10.

reer.³¹⁰ Unfortunately, evidence indicating that judges adjust their opinion-writing practices to minimize their workload and maximize their affirmance rate³¹¹ can be highly problematic, especially where the issue is complicated or unfamiliar. Of the opinions studied, the combined average reversal rate for the Second and Ninth Circuits is 17.5%, while the average reversal rate for all other circuits combined is 23.5%. Notably, the Second and Ninth Circuit reversal rates—14.9% and 22.6% respectively—were amongst the lowest in the sample, conceivably due to familiarity with the substantial

310. Smith, *supra* note 302, at 30-31.

Students of judicial behavior commonly argue that judges do not like to have their decisions reversed. This assumption can have several bases. First, being overturned implies that a judge, or panel of judges at a higher level, has determined that the lower-court judge applied the law incorrectly. [A] judge “might prefer to avoid reversal in order to evade conscious awareness of the real constraints on her power.” “Judges, no more than other men, enjoy the prospect of public correction and reprimand” . . . [and] are “highly sensitive to being reversed.” Nonetheless, some judges in some contexts may wear reversals as badges of honor. Interviews with federal judges support the notion that judges dislike having their decisions reversed. An anonymous district judge from the District of Columbia expressed his distaste for having decisions reversed: “Nobody likes it. I don’t like it at all. But you have to call them as you see them, and sometimes they [the circuit-court judges] just don’t see them in the same way When the Supreme Court reverses the appeals court and rules in your favor,’ the judge says, “that’s the real happy situation.”

Id. (citations omitted).

311. Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals* 24 (Univ. of Chi. John M. Olin Law & Econ. Working Paper Series, Paper No. 508, 2010; N.Y. Univ. Law & Econ. Research Paper Series, Paper No. 10-06, 2010), available at <http://www.law.uchicago.edu/files/file/508-eap-dist-judge.pdf>.

Reversals can influence judges in a couple of ways. Aversion to being reversed can motivate lower-court judges to conform their decisions to doctrines articulated by higher courts. In this way, it is the predicted cost of reversal, or the anticipated negative utility of having a decision reversed multiplied by the probability that the decision will be reversed, that motivates lower-court judges. For district-court judges, evaluating the probability of reversal is complicated. This uncertainty comes from several factors. First, a district judge does not know whether the losing party will appeal the decision to a higher court. If they do not, the chance of reversal is zero. A second factor is that the law is simply ambiguous or novel in many cases. The fact that both the plaintiff and defendant are willing to invest money to litigate a legal issue suggests that each side believes it has a substantial chance of winning. Since cases reaching trial are “close calls,” it is difficult for a district judge to predict how the circuit court will view the issue. Finally, if the decision is appealed, the district judge cannot know which judges on the circuit court will hear the case. Once the appeal is filed, it will be assigned to a randomly selected three-judge panel. The fact that predicting which decisions are likely to be reversed is so complicated makes a strategy of prospectively avoiding reversal unlikely to succeed.

Smith, *supra* note 302, at 31 (citation omitted).

similarity doctrine. To at least a limited extent, this finding supports the notion that when “generalist judges are confronted with the specialty subject matter infrequently, they lack the motivation, experience, and time to develop an understanding of the law.”³¹² There is a compelling argument that “copyright is a highly specialized and technical body of law . . . that would be best handled by specialized judges,”³¹³ who might be better able to mediate the “frustrating and contradictory results at the district court level.”³¹⁴ Even so, “[t]here is no evidence that appellate panels are [any] more likely than federal district court judges to possess” the expertise necessary to write a theoretically correct opinion discussing substantial similarity.³¹⁵ Considering the subtle differences in how the circuits compare works in copyright infringement cases and the apparent cloudiness of the correct procedure for making the substantial similarity determination,³¹⁶ reversal rates may actually have less to do with quality, and more to do with “maintaining uniformity in judicial decisions.”³¹⁷ Frequent reversals may also “reflect a period of

312. Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377, 378.

Most important, the court’s expertise should enable it to craft better opinions, especially in fields where a small number of cases are now distributed rather thinly among the regional courts. Since generalist judges are confronted with the specialty subject matter infrequently, they lack the motivation, experience, and time to develop an understanding of the law. They decide the occasional case based upon a cursory understanding of policy and receive limited feedback on how well they fared. Thus, [a] specialized court’s sustained involvement with a field would facilitate superior decisionmaking.

Id.

313. Michael Landau & Donald E. Biederman, *The Case for a Specialized Copyright Court: Eliminating the Jurisdictional Advantage*, 21 HASTINGS COMM. & ENT. L.J. 717, 719 (1999).

314. *Id.* at 719, 738-39 (arguing that “the national nature of the copyright industries and the highly technical legal doctrines . . . support the notion that copyright cases should be handled by a single court of nationwide jurisdiction, and that more of the decisions on the issues should be made by judges rather than juries”). “These measures are necessary in order that uniformity in the handling of copyright cases can be achieved.” *Id.* at 719.

315. See Baye & Wright, *supra* note 308, at 14. “Along with efficiency in decisionmaking, the other probable benefits of specialized courts are uniformity in the law and expertise in decisionmaking.” Ford, *supra* note 92, at 49. “The test of this hypothesis is to compare each circuit’s relative experience with copyright litigation to its representation in copyright and intellectual property casebooks, on the assumption that casebook editors generally prefer better decisions.” *Id.* at 5. “With a few exceptions, federal judges are generalists who have jurisdiction over an enormous range of legal disputes” *Id.* at 3. *But see id.* at 41 (“Only two circuits, the Second and the Ninth, plausibly possess sufficient experience with copyright litigation to acquire substantially greater expertise relative to the other circuits.”).

316. See *supra* Section II.B.

317. Smith, *supra* note 302, at 30.

A reversal is the most definitive and forceful mechanism for communication of legal policy possessed by a higher court. It is also the only commonly used tool pos-

uncertainty in the law that may decrease over time or a disagreement between district court and appellate judges on the substantive merits.”³¹⁸ Additionally, factors such as circuit size, docket composition, and circuit ideology have been shown to impact reversal rates.³¹⁹

CONCLUSION

The door has been swung open. By providing the results of the first empirical analysis of substantial similarity litigation in the U.S. circuit courts, this study has contributed the initial groundwork for a future body of research examining the dynamics of the substantial similarity tests. It has answered questions that deepen an understanding of the substantial similarity doctrine, and it has shed light on the doctrine’s impact on creators’ rights. Yet, just as research is undertaken to answer questions, its discoveries inevitably raise many others. With the ultimate goal of proposing a framework, rooted in concrete empirical evidence, for how copyright infringement ought to be decided, further exploration of the following questions is crucial.

What is the extent of the linkage between the fair use and substantial similarity doctrines? This study has suggested that *Campbell*’s ruling in favor of the defendant parodist may have tipped the scale in favor of alleged infringers, influencing a subsequent trend of defendant-favorable substantial similarity case law.³²⁰ *Campbell* readjusted the weight to be accorded to each of the four factors of the fair use test, creating concern that the out-

essed by higher courts that imposes any costs on lower-court judges. Because of these attributes, reversals are likely to play an important role in maintaining uniformity in judicial decisions. . . . [J]udicial opinions are the most straightforward way for this hierarchical communication to occur. Opinions can list and explain the criteria that higher courts want lower courts to apply in deciding cases; are available for all lower-court judges to see; and apply to all lower courts supervised by the higher court that issues the opinions. However, while the opinions apply equally to all such lower-court judges, judges not directly affected by an opinion are not likely to feel the impact of the opinion as much as the judge whose decision was affirmed or overturned by the circuit court.

Id.; see also Frank B. Cross & Stefanie Lindquist, *Judging the Judges*, 58 DUKE L.J. 1383, 1385 (2009); FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 1-2 (2007) (“[T]he circuit courts are much more important [than the U.S. Supreme Court] in setting and enforcing the law of the United States.”); DAVID E. KLEIN, MAKING LAW IN THE UNITED STATES COURTS OF APPEALS 4 (2002) (“The truth, well known but often overlooked in the media and even in serious scholarship, is that lower court judges play a major role in the development of legal doctrine.”).

318. Baye & Wright, *supra* note 308, at 14-15.

319. Stefanie A. Lindquist, *Bureaucratization and Balkanization: The Origins and Effects of Decision-Making Norms in the Federal Appellate Courts*, 41 U. RICH. L. REV. 659, 690-91 (2007).

320. See *supra* Subsection III.B.2.

come of a fair use case inextricably hinges upon the outcome of the first factor.³²¹ Thus, if the fair use test is only marginally influenced by the third factor, which considers whether the two works are substantially similar,³²² it is possible that substantial similarity case law may have been affected by *Campbell's* holding and may continue to be influenced by fair use case law.

Should the variations of the substantial similarity tests be abolished in favor of one universal test? This study has found that if the opinions are distributed into three groups based on the substantial similarity test applied by the court—(1) the ordinary observer test and more discerning ordinary observer test; (2) the extrinsic/intrinsic test and extrinsic/intrinsic test with intended audience test; and (3) the abstraction-filtration-comparison test and abstraction-filtration by the intended audience test—the likelihood that the copyright holder will prevail remains relatively unchanged, regardless of which test is used.³²³ Despite the confusion engendered by the tests and the criticism launched against them, this study suggests that their differences are inconsequential.³²⁴ No test is superior.³²⁵

Would the substantial similarity win rates of the specialized versions of the substantial similarity tests³²⁶ differ if the sample size was larger? These specialized tests evidenced high variation from their non-specialized counterparts.³²⁷ For example, opinions applying the more discerning ordinary observer test had a 55.6% substantial similarity win rate; opinions applying the extrinsic/intrinsic test with the intended audience test had a 25.0% substantial similarity win rate; and opinions applying the abstraction-filtration by the intended audience test had a 42.9% substantial similarity win rate.³²⁸ However, these opinions comprised only a small portion of the 234 cases in the sample;³²⁹ therefore, further study of these tests must be pursued.

What explains the high degree of variation between the substantial similarity win rates across different subject matters? In disputes involving architectural works, the copyright holder prevailed in only 8.3% of the opinions,³³⁰ while the copyright holder prevailed in 53.6% of disputes involving

321. Beebe, *supra* note 10, at 553, 583.

322. See, e.g., *id.* at 553, 615-16. For instance, if a court finds that the defendant's work is "transformative" or "noncommercial" under the first factor, then the court will also likely find that the remaining three factors favor the defendant. *Id.* at 583.

323. See *supra* Subsection III.C.2.

324. See *supra* Subsection III.C.2.

325. See *supra* Subsection III.C.2.

326. "Specialized versions of the substantial similarity tests" refers to the more discerning ordinary observer test, the extrinsic/intrinsic test with the intended audience test, and the abstraction-filtration by the intended audience test.

327. See *supra* Subsection III.C.2.

328. See *supra* Subsection III.C.2, figs.4 & 5, and notes 228-29.

329. See *supra* note 228.

330. See *supra* Subsection III.D.6.

graphic works.³³¹ This study posited that the variation may be attributable to the extent to which each type of subject matter is comprised of functional elements.³³² For example, the low substantial similarity win rate of opinions involving architectural works may be explained by the many functional elements inherent in architecture, such as the unprotectable placement of a bathroom near a bedroom and the unprotectable inclusion of common design features.³³³ At the opposite end of the spectrum, the broad category of pictorial, graphic, and sculptural works requires the court to take an approach that is tailored to the specific type of work because the expression of a stuffed animal, for instance, is much different from the expression of a painting.³³⁴ Even within each specific graphic work, the differences in expression can seem infinite. Certainly, one can imagine virtually limitless ways to paint a landscape. This suggests that a copyright holder's likelihood of prevailing may depend on the extent to which the subject matter is inherently comprised of functional elements, scènes à faire, and finite opportunities for creative expression. Consequently, the variance in win rates amongst the circuits may be a product of the subject matters most often addressed within each circuit.

How would the outcomes of substantial similarity cases differ if the disputes terminated on summary judgment had instead proceeded to trial? Evidence that summary adjudications coincide with fewer decisions favorable to the copyright holder suggests that when a dispute is decided on summary judgment, the proper test for infringement is not appropriately or entirely applied.³³⁵ Further, this study revealed that district court grants of summary judgment are frequently affirmed—more so than any other disposition—which raises the possibility that the circuit courts may not be conducting complete *de novo* reviews.³³⁶ Further exploration of these findings is warranted.

What explains the consistently low overall substantial similarity win rate for the copyright holder? If inequitable decision-making is at the crux of the low overall substantial similarity win rates, the frequency of summary adjudications, and the variance of win rates among the circuits and among the various subject matters then what is the solution?

As an understanding of the substantial similarity doctrine evolves and as the variables that contribute to a finding of copyright infringement are exposed and substantiated, it may become apparent that the options for improving the current framework are scarcely limited. The adoption of special-

331. See *supra* Subsection III.D.2.

332. See *supra* Subsection III.D.6.

333. See *supra* Subsection III.D.6.

334. See *supra* Subsection III.D.2.

335. See *supra* Subsection III.E.2.

336. See *supra* Subsection III.E.2.

ized intellectual property courts would be one way to counteract the possibility of systematic failures within the substantial similarity doctrine.³³⁷ Indeed, if bankruptcy courts were established in response to the critical and rapid changes in the commercial landscape of the U.S. economy,³³⁸ it stands to reason that intellectual property—vital to the U.S. economy and constantly evolving in ways no one could have anticipated—may also require specialized courts.³³⁹ There can be no doubt that the modern world depends on creativity and innovation—the hallmarks of copyright and intellectual property—and, as such, it is axiomatic that society must continually rethink and revise the fundamental frameworks upon which it operates. With intellectual capital contributing between \$8.1 trillion and \$9.2 trillion, the equivalent of 55% to 62.5% of the U.S. gross domestic product,³⁴⁰ the judicial system, generally, and the substantial similarity doctrine, specifically, cannot afford to be an exception to such revision. The substantial similarity doctrine is one that demands reevaluation; a consistent test with equitable outcomes is necessary to protect the integrity and growth of intellectual capital in the U.S. economy.

337. See *supra* notes 313-15 and accompanying text.

338. See Douglas G. Smith, *The Role of the Courts in Shaping American Bankruptcy Law: Review of "Debt's Dominion—A History of Bankruptcy Law in America,"* 33 SETON HALL L. REV. 109, 111, 125-26 (2003).

339. See *supra* notes 313-15 and accompanying text.

340. See *supra* Section I.A.

