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Substantial Similarity in Copyright Law

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In this release, the authors update and expand Substantial Similarity in Copyright Law with useful new discussion of the following important topics, along with many others:

**Verbatim copying:** A federal district court in New York notes that photographs cropped and flipped are still exact copies (Jackson v. Odenat). See § 2:5.1, at note 104.

**Extrinsic-intrinsic test:** Courts in the Ninth Circuit may determine substantial similarity on motions to dismiss by application of the extrinsic test only. See § 3:2.1[I], at note 159.1.

**Characters:** In a federal district court in Texas, substantial similarity was found between defendant’s characters in a China–themed card game and plaintiff’s characters in a Wild West–themed card game (DaVinci Editrice S.R.L. v. Ziko Games, LLC). See § 5:3, at note 17.

**Nonfiction writing:** The selection and arrangement of elements in plaintiff’s writings was unprotected because it followed governing manual of a national veterinary organization (Lyons v. American College of Veterinary Sports Medicine & Rehabilitation). See § 6:1, at note 11.1.

**Audiovisual works:** A lack of substantial similarity in the visual details between presentations of the natural world in a fantastical way was the basis for dismissal of the complaint in Dean v. Cameron. Rejecting plaintiff’s claims that landscapes in the motion picture Avatar infringed the copyrights in his paintings, the federal district court found that most of the similarities related to unprotected elements such as ideas, and the differences “overwhelm any superficial similarity.” See § 7:3, at note 19.2.

**Music—sampling:** In Pryor v. Wagner/Chappell Music, Inc., a California federal district court found that a half-second snippet of “get
“down” sampled from “Bumpin’ Bus Stop” that featured the “signature voice” of the recording artist David Pryor was sufficiently original to warrant copyright protection. See § 9:3, at note 43.1.

**Fabrics:** Although the Second Circuit has stated that fabrics used in garments should not be scrutinized too carefully for differences, the court seemed to take a different approach when it concluded as a matter of law that the lace designs in underwear waistbands were not substantially similar because “Klauber’s designs appear delicate and ornate, with the dominant element being formed by the curling sprigs, [while] Bon-Ton’s design conveys a more rudimentary and abstract feel, with the dominant element being the straight portions of the sprigs” (*Klauber Bros., Inc. v. Bon-Ton Stores, Inc.*). See § 10:5.6, at note 82.1.

**Architectural works:** According to the Second Circuit in *Zalewski v. Cicero Builder Development Inc.*, “[e]fficiency is an important architectural concern. Any design elements attributable to building codes, topography, structures that already exist in the construction site, or engineering necessity should therefore get no protection.” See § 11:1, at note 10.

**Derivative works:** The conversion of printed book to eBook is pure transcription and does not create a new derivative work, says a district court in the Southern District of New York (*Peter Mayer Publishers, Inc. v. Shilovskaya*). See § 15:1, at note 22.

**Lay opinion:** On the issue of substantial similarity, the courts do not consider articles or Internet postings (*Dean v. Cameron*). See § 17:2, at note 17.1.

**Illustrations from decided cases:** The release provides new illustrations of the matters in issue in these cases:

- *Hua-Cheng Pan v. Kohl’s Department Stores, Inc.* (Santa Claus figurines) (see new Appendix A.2.G)
- *Dean v. Cameron* (scenes in paintings and film) (see new Appendix A.3.E)
- *Wilson v. Walt Disney Co.* (snowman figures in films) (see new Appendix A.3.F)
- *Olem Shoe Corp. v. Washington Shoe Corp.* (rubber boots) (see new Appendix A.9.L)
- *Karol Western Corp. v. Smith News Co.* (design on flask and iconic sign) (see new Appendix A.11.J)

In addition, the **Table of Cases**, the **Defendant-Plaintiff Table**, and the **Index** have been updated.
FILING INSTRUCTIONS

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