

ABSTRACTS

A Study on the Comprehensive-nonliteral-similarity Test to the Literary Works.

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If two works are similar only in structure, can it properly be said there is an illicit copying of expression rather than idea? Applying the substantial-similarity test and especially the comprehensive-nonliteral-similarity test, the court first removes from consideration the uncopyrightable elements of the copied materials. Such elements include facts, ideas, and “scènes à faire”. This article shows the way how the courts apply the comprehensive-nonliteral-similarity test and criticizes it. First, the courts dissect the works and find common or similar components between the two works. Then they remove uncopyrightable elements from each component and compare it with common component of the other work. However, such dissection approach would preclude copyright protection for a work containing an innovative selection or arrangement of elements because each uncopyrightable element would be eliminated and nothing would be left for purposes of determining substantial similarity. In this case, the elimination of “unprotectable” elements results in a finding of no copyright infringement. It would be inconsistent with the copyright law's purpose of providing incentives to authors of original works because the courts do not concern whether there is creativity in structure which is composed of selected elements and made by arranging them.

Keyword : comprehensive nonliteral similarity, substantial similarity, infringement of copyright, copying, total concept and feel test